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*J. N. D.*  
Advocate High Court  
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*Kabzar Chandra Agarwal*  
*of Etawah.*  
REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE

AND

THE LORDS  
OF  
HER MAJESTY'S MOST HONOURABLE  
PRIVY COUNCIL

APPEAL FROM THE SUDDER DEWANNY ADAWLUT AND  
HIGH COURTS OF JUDICATURE

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ., M.A.,  
ONE OF HER MAJESTY'S COUNSEL.

VOL. XIV.

1871-2.

CALCUTTA :

THE UNIVERSITY PRESS, 14, COLLEGE SQUARE.

*S. N. D.*  
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Srinagar



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*J. N. Das*  
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L I S T

OF THE

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV. C. 41.

FOR HEARING AND REPORTING ON APPEALS TO HER  
MAJESTY IN COUNCIL.

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1871-2.

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The Marquis of *Ripon* (Lord President).  
The Duke of *Marlborough* (formerly Lord President).  
The Duke of *Buccleugh* (formerly Lord President).  
The Duke of *Buckingham* (late Lord President).  
The Earl *Granville* (formerly Lord President).  
The Earl *Russell* (formerly Lord President).  
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Lord *Cairns* (late Lord High Chancellor).  
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The Right Hon. Sir *Richard Torin Kindersley*, Knt. (late one of the Vice-Chancellors of the Court of Chancery).

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The Right Hon. Sir *Robert Joseph Phillimore*, Knt., D.C.L., Judge of the High Court of Admiralty.

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The Right Hon. Sir *William Milbourne James*, Knt., one of the Lords Justices of the Court of appeal in Chancery.

The Right Hon. Sir *Barnes Peacock*, Knt. (late Chief Justice of the High Court at *Calcutta*).

The Right Hon. Sir *George Mellish*, Knt., one of the Lords Justices of the Court of appeal in Chancery.

The Right Hon. Sir *John Stuart*, Knt. (late one of the Vice-Chancellors of the Court of Chancery).

The Right Hon. *Mountague Bernard*, D.C.L.

The Right Hon. Sir *James Shaw Willes*, Knt., one of the Judges of the Court of Common Pleas (deceased).

LIST OF THE JUDICIAL COMMITTEE.

v

The Right Hon. Sir *Montague Edward Smith*, Knt. (late one of the Judges of the Court of Common Pleas).

The Right Hon. Sir *Robert Porrett Collier*, Knt. (late one of the Judges of the Court of Common Pleas).

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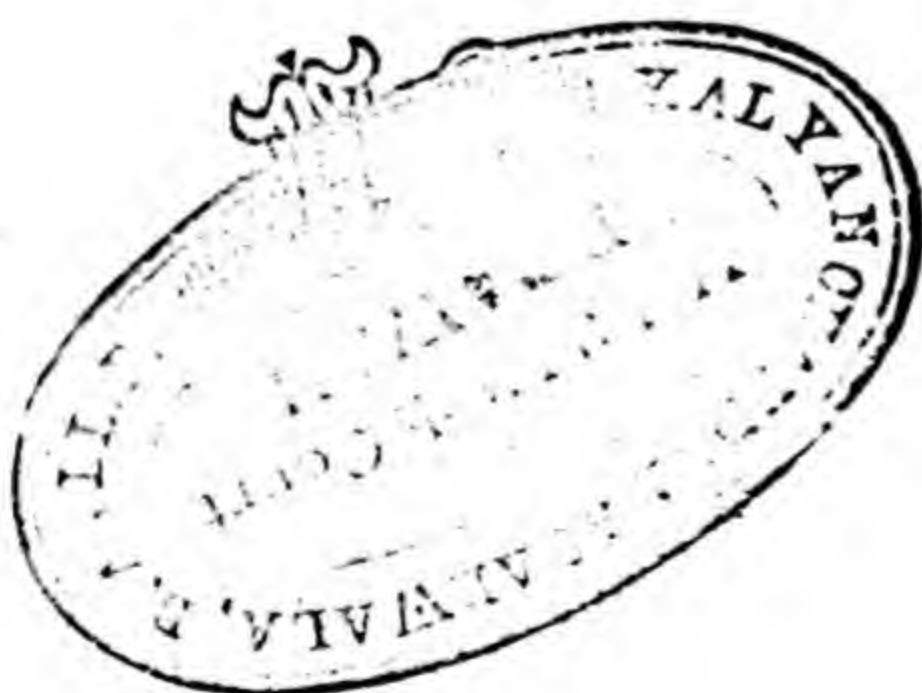
Assessor in appeals from the *East Indies*, under the Statute, 3rd & 4th Will. 4, c. 41:—The Right Hon. Sir *Lawrence Peel*, Knt., formerly Chief Justice of the Supreme Court at *Calcutta*.

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By clause XIV. of the 3rd & 4th Vict. c. 86 (The Act for better enforcing Church Discipline), Archbishops and Bishops, Members of the Privy Council, are Members of the Judicial Committee in appeals under that Act.

*J. N. Das*  
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Jammu & Kashmir  
Srinagar.

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*J. N. Das*  
Advocate High Court  
Jammu & Kashmir  
Srinagar.

## A P P E N D I X

ORDER IN COUNCIL FOR MORE EFFECTUAL PROSECUTION OF APPEALS BEFORE HER MAJESTY IN COUNCIL.

At the Court at Windsor Castle, the 26th day of June, 1873.

Present :

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS in many appeals now pending before Her Majesty in Council no effectual steps have been taken by the parties or their Agents to set down their cases for hearing, although more than twelve months have elapsed since the arrival and registration of the transcript of appeal in this Country, and it is expedient to make further provision in that behalf, HER MAJESTY, by and with the advice of Her Privy Council, and upon a recommendation of the Lords of the Judicial Committee of the Privy Council, is pleased to order, and it is hereby ordered, that the Solicitors or Agents for the party Appellant in all such appeals now pending before Her Majesty in Council are hereby required to take effectual steps to set down their cases for hearing within six months



from the date of this Order, and in all other appeals to Her Majesty in Council within a period not exceeding twelve months from the date of the arrival and registration of the transcript in this Country.

And HER MAJESTY is further pleased to order, and it is hereby ordered, that it shall be the duty of the Registrar of the Privy Council to report to the Lords of the Judicial Committee the names of the parties and dates of the Decrees in appeals in which no effectual steps have been taken within the aforesaid periods of time to set down the case for hearing; and the Lords of the Judicial Committee of the Privy Council shall be at liberty to call upon the Appellant or his Agent in such cases to show cause why the said appeal or appeals should not be dismissed for non-prosecution, and (if they shall so think fit) to recommend to Her Majesty the dismissal of any such appeal, or to give such directions therein as the justice of the case may require.

And HER MAJESTY is further pleased to order that nothing in the present Order shall prevent the dismissal of an appeal under the 5th of the Rules approved by Her Majesty on the 13th of June, 1853, in cases to which that Rule is applicable.

Whereof the Governors of Her Majesty's Plantations and Dominions abroad, and the Judges or Officers of Her Majesty's Courts of Justice from which an appeal lies to Her Majesty in Council, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

ARTHUR HELPS.



*J. N. Das*  
**Advocate High Court**  
**Jammu & Kashmir**  
**Srinagar.**

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Srinagar.

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*J. N. Das*  
 Advocate High Court  
 Jammu & Kashmir  
 Srinagar  
**CASES**  
 IN  
 THE PRIVY COUNCIL  
 ON APPEAL FROM  
 THE EAST INDIES.

---

RADANATH DOSS and others ... *Appellants*;

AND

GISBORNE & CO. ... *Respondents*.\*

*On appeal from the High Court of Judicature at  
 Calcutta.*

**T**HE suit in this appeal was brought by the Appellants for redemption of a mortgaged estate called *Maheeanwan*, consisting of villages and other lands, with mesne profits, against the Respondents, who were

16th, 18th, &  
 19th Jan.,  
 1871.

A usufructuary mortgage, to run over a certain number of years, was executed in 1828 by a member of a joint Hindoo family, with

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colville and the Right Hon. Sir Joseph Napier, Bart.

Assessor :—The Right Hon. Sir Lawrence Peel.

the consent of the other members, to *R*, who afterwards sold the mortgaged estate to *H*. and *H*., whose Agent *R*. was. *H*. and *H*. subsequently, in 1841 and 1851, conveyed the estate to *G*. & Co., as an absolute purchase in fee. In a suit for redemption of the mortgage brought in 1864, *G*. & Co. set up as a defence their title as *bona fide* Purchasers without notice, and, having been in possession more than twelve years, pleaded the Limitation of suits Act, No. XIV. of 1859, sect. 5, as a bar to the suit. Held: First, that the *onus* was on *G*. & Co. to establish by clear and satisfactory evidence the termination of the mortgage and the absolute sale by the Mortgagees to *R*. the root of their title; and, in the absence of such proof, that the transaction in 1841 and 1851 was merely an assignment of the mortgage; and,

Secondly, in the circumstances, that *G*. and Co. were not "Purchasers" within the true construction of sect. 5 of Act, No. XIV. of 1859, to entitle them to the benefit of the twelve years' limitation as a bar to the suit for redemption.



1871  
 RADANATH  
 DOSS  
 v.  
 GISBORNE.

in possession, and claimed to be Assignees and *bond fide* Purchasers of the estate without notice of the Appellants' equity of redemption.

The Respondents, who were the Assignees of the original Mortgagees, admitted the Deed of Sale to *Russick Lall Doss* by *Kunhya Lall Doss*, a member of the Appellants' family, and also an *Ikrarnamah*, by which such sale was made conditional, which *Ikrarnamah* they alleged had been subsequently surrendered by *Kunhya Lall Doss*, whereby the sale became absolute, and *Russick Lall Doss*, under whom they claimed, the sole Owner of the estate in question. They denied that the estate was the property of an undivided family, or that *Kunhya Lall Doss* had acted only as the Agent and Manager of the family in his dealings with it, and they insisted on the law of limitation, contained in Act, No. XIV. of 1859, as a bar to the claim of the Appellants.

The plaint was filed by the Appellants in 1862, in the Court of the Principal *Sudder Ameen* of *Bhagulpore*, against the Respondents, for the redemption of the mortgage executed on the 21st of *November*, 1828. The plaint set forth the joint interest of the family in the premises so mortgaged, and alleged that full satisfaction and payment of the mortgage debt, had taken place by means of the usufruct and produce of the mortgaged lands, leaving a large sum to be accounted for and paid over by the Mortgagees and their Assignees to the Mortgagors; and it denied that the conditional sale was ever converted into an absolute sale by the surrender of the *Ikrarnamah*; but insisted, that the alleged transaction of the return of the latter



instrument to *Russick Lall Doss* was entered into, without the other shareholder's knowledge, by *Kunhya Lall Doss* collusively with the former, in order to avoid an execution, and without effecting, or intending to effect, any real alteration in the relation of Mortgagors and Mortgagee.

The Respondents by their written statement pleaded the Limitation of suits Act, No. XIV. of 1859, as a bar to the suit, and also denied the joint interest of the Plaintiffs with *Kunhya Lall Doss* in the *Maheewan* estate, and asserted that the conditional sale had been converted into an absolute sale by the return of the *Ikrarnamah*, on the 8th of November, 1829.

The hearing took place before Mr. *H. R. Madocks*, the Judge of *Bhagulpore*, who, on the 28th of August, 1865, delivered judgment, in which, after review of the evidence and arguments, he decided:—First, that *Kunhya Lall Doss* was a co-partner in the *Maheewan* estate of the Plaintiffs. Secondly, that the mortgage was not extinguished by the return of the *Ikrarnamah*. Thirdly, that the Plaintiffs' claim was not barred by limitation, as under Act, No. XIV. of 1859, sect. 15, the period for the redemption of a mortgage of immovable property was sixty years, which period had not then elapsed. Fourthly, that the Plaintiffs were not estopped from bringing the suit by reason of having made any contrary allegation in a previous suit. Fifthly, that the Defendants were not Purchasers without notice, but had, or might have had, if they had desired it, full notice and knowledge of the Plaintiffs' claim. As to mesne profits, the Judge found that the mortgage debt had been fully paid off out of the usufruct, leaving

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a surplus due to the Plaintiffs from the Respondents, which for the six years' preceding suit, to which that part of the claim was confined by the law of limitation applicable to mesne profits, amounted to Rs. 24,324, and a decree was given by the Judge to the Appellants for possession of 14 *annas* shares of the *Talook*, and the same proportion of the sum of Rs. 24,324 was thereby decreed to them.

The Respondents appealed from this decree to the High Court.

The appeal was heard before a Division Bench of the High Court, consisting of Mr. Justice *Norman* and Mr. Justice *Campbell*, who reversed the decree of the Court below, and dismissed the Appellants' suit, leaving each side to pay their own costs. By their judgment the Court stated, that they were disposed to agree with the Judge of *Bhagulpore* in his finding as to the joint family interest in the *Maheewanwan* estate; and as to the surrender by *Kunhya Lall Doss* of the *Ikrarnamah* not having been *bonâ fide*; although Mr. Justice *Norman* thought it not proved that the accounts rendered by *Russick Lall Doss*, after the return of the *Ikrarnamah* to *Kunhya Lall Doss*, were so rendered as Mortgagee to Mortgagor, and he was of opinion, that even if there had been fraud on the part of *Shawe* and *Hawes*, who bought the estate from *Russick Lall Doss*, the Respondents, *Gisborne & Co.*, were no parties to it, and that they were proved to have bought from *Shawe* and *Hawes* an absolute interest in the *Maheewanwan* estate for a fair price, though possibly, as he also stated, for a lower one, in consequence of the exceptionable character of the title, but without any want of good faith, and that, therefore, under



the Law of limitation Act, No. XIV. of 1859, sect. 1, cl. 15, and sect. 5, not being Mortgagees, as incorrectly, as he considered, found by the Lower Court, but Purchasers from the Mortgagees; *Gisborne & Co.* could successfully plead twelve years' adverse possession from the date of their purchase, and that to constitute a *bonâ fide* purchase for valuable consideration, under the 5th section, it was not necessary for the Purchasers to satisfy the Court, that at the time of their purchase they had no notice of the Plaintiffs' claim, but only that they were guilty of no actual fraud, or wilful shutting of their eyes to the truth. Mr. Justice *Campbell*, although expressing his general concurrence with Mr. Justice *Norman*, differed from him as to the exact position of *Gisborne & Co.*, who, as he observed, "had no covenant for title, and their Vendors did not even specifically sell the estate now in dispute, and, so far, they might be considered as mere Assignees of the mortgage." And further, that :—"They (*Gisborne & Co.*) purchased an estate with a doubtful title for what it was worth; but that they never knew, or had the means of knowing, that the Plaintiffs' claim was a good claim." And Mr. Justice *Campbell* expressed his opinion that, "though they (*Gisborne & Co.*) might not be *bonâ fide* Purchasers without notice, who could at once defeat a *cestui que* trust, they were *bonâ fide* Purchasers within the meaning of the Law of limitation, that is, they were parties who purchased honestly without actual fraud." And he finally stated in his judgment that he concurred, "though with much doubt and hesitation," in dismissing the suit on the ground of limitation.

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The appeal was from this decree.

Sir *R. Palmer*, Q.C., Mr. *Leith*, and Mr. *Doyne*,  
 for the Appellants, and

The Solicitor-General (Sir *John D. Coleridge*,  
 Q.C.), Mr. *Cotton*, Q.C., and Mr. *J. D. Bell*,  
 for the Respondents.

The questions argued were:—

First, whether the estate was a joint Hindoo family property.

Second, whether the mortgage transaction in 1828 afterwards became an absolute sale, and

Third, whether the Respondents were *bonâ fide* Purchasers for a valuable consideration, without notice from the Mortgagees, and from length of possession as Purchasers, the right of redemption was barred by sect. 5 of Act, No. XIV. of 1859.

Upon the operation of the limitation, after twelve years' possession, as a bar to the suit, *Ben. Regs.* III. of 1793, sect. 14; VII. of 1795, sect. 8; II. of 1803, sect. 18; and Act, No. XIV. of 1859, sect. 1, cl. 15, sects. 5, 13, and 15, were cited.

As to the title of the Respondents as Purchasers, and the equities affecting their Vendors in respect to the estate attaching to them, *Whitworth v. Gaugain* (a); *Rodger v. The Comptoir d'Escompte de Paris* (b), were referred to and relied on.

Their Lordships' judgment was pronounced by

The Right Hon. Lord CAIRNS:—

The claim in this case, which led to the decision

(a) 3 Hare, 416.

(b) 5 Moore's P. C. Cases (N.S.), 538.



which is under appeal, was a claim, in substance, for the recovery of property at present in the possession of the Respondents, Messrs. *Gisborne & Company*. The recovery of that property was sought by the Appellants on the footing, that it had been made the subject of a conditional sale in the year 1828; and that they, the Appellants, had now the right to redeem the property,—the amount for which the property had been conditionally sold or mortgaged, having been paid off by the receipt of profits. This mortgage, made in the year 1828, was made by a person of the name of *Kunhya Lall Doss* as Mortgagor, to one *Russick Lall Doss* as Mortgagee. The Appellants say, that *Kunhya Lall Doss* was the member of a joint family, joint as regards his property, and that they were the other members of that joint family, and that the mortgage was made either with their previous approbation, or their subsequent assent. *Russick Lall Doss*, beyond doubt, was the native Agent of the firm of *Shawe and Hawes*, and the mortgage, beyond doubt, was made to *Russick Lall Doss*, because as the law stood at that time, Europeans could not have held immovable property in this part of *India* in their own name (a). That law having subsequently been altered, *Russick Lall Doss* assigned over to his principals, *Shawe and Hawes*, the property which he thus held for them in mortgage. Subsequently *Shawe* relinquished his share to *Hawes*, and finally by a Deed executed in the year 1841, the details of which will afterwards have to be referred to, *Hawes* passed over or conveyed

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the property to the present Respondents, Messrs. *Gisborne & Company*.

Now, the first question which arises in this state of things, is as to the right of the Plaintiffs to redeem this property? Their possession as members of a joint family is denied by the Respondents, who contend, that there is no evidence that the family was joint, or that this property belonged originally to any person other than *Kunhya Lall Doss*, the Mortgagee. Upon that question, Mr. *Madocks*, the District Judge before whom the case first came, delivered a very elaborate and careful judgment, in which he came to the conclusion, that the joint ownership of the property was made out in favour of the Appellants, and, although it was not necessary for the High Court of *Calcutta*, in the view they took of another part of the case, absolutely to decide that question, they do not appear to have disapproved of the conclusion at which Mr. *Madocks* had arrived on this point. The evidence having been so fully and satisfactorily commented upon by Mr. *Madocks*, their Lordships do not think it necessary to say more than this, that looking to the form of the Government settlement of this property, looking to the history of the family, which is in evidence, looking to the accounts going down to the year before the date of the mortgage showing the dealings of the family between themselves, looking to the *Ikrarnamah* executed between *Kunhya Lall Doss* and the other members of the family almost contemporaneously with the mortgage of 1828, looking to the dealings with the *Mouzah Ugda* which was excepted out of the mortgage of 1828, although forming part of the



whole state, their Lordships are satisfied that this property was the joint property of the family, and that *Kunhya Lall Doss* was mortgaging it with the assent of and as the Manager for the whole family.

Their Lordships would add to the general description of the evidence which has satisfied them of this, a reference also to the statements which were made very shortly after the conveyance of 1841 to Messrs. *Gisborne & Company*. In 1843, a suit was brought by the present Appellants, or some of them, against Messrs. *Gisborne & Company*, making parties also *Russick Lall Doss* and *Kunhya Lall Doss*. The Plaintiffs in that suit were nonsuited upon technical grounds, but in that suit the Plaintiffs stated their title substantially in the same way that it is now stated, and in the answers to that suit their Lordships find that Mr. *Barnes*, a member of the firm of *Gisborne & Company*, and the other members of that firm, stated that the Plaintiff's suit was totally false, and that the reasons of the falsity of the Plaintiff's suit were stated in the answer of *Russick Lall Doss*, another Defendant, and that that answer was sufficient. They, therefore, referred their case to the answer of *Russick Lall Doss*, and were content to adopt it as the statement of their case. Now, *Russick Lall Doss*, as has been said, was the native Agent of the Indigo Factory of *Shawe and Hawes* at the time of the mortgage in 1828. He must have known perfectly well everything connected with the title and the circumstances of the family, one member of which was making a mortgage to him; and what *Russick Lall Doss*, having these means of peculiar knowledge, said in the year 1843, was this, "Oh!

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administer of justice, let your presence consider the fact, that although the Plaintiffs have no right and interest in the said *mouzahs*, yet even it is clearly evident from the contents of the former plaint that the Plaintiffs themselves have admitted that the said *Kunhya Lall Doss*, by the advice and with the concurrence of the Plaintiffs, sold the property in dispute to me"—that of course means mortgaged—"for the sum of Rs. 17,011, with the object of liquidating the money due to the said Gentleman from *Kunhya Lall Doss*, under the Deed of mortgage, dated the 25th *May*, 1826." *Russick Lall Doss* was, therefore, content to affirm at this time, and Messrs. *Gisborne & Company* were content to adopt his statement, that *Kunhya Lall Doss* had previously mortgaged the property by the advice and with the concurrence of the Plaintiffs,—advice and concurrence which would have been utterly useless and unmeaning unless the Plaintiffs had been joint Owners of the property.

Their Lordships, therefore, on this part of the case, have no hesitation in accepting the conclusion of the Court of First Instance, and they have the satisfaction of thinking, that in that respect, they are not differing from the opinion of the High Court of *Calcutta*, although it was not absolutely necessary for that Court to decide the question.

The next objection which was taken to the title of the Plaintiffs to redeem is this. It is said that the conditional sale having been made in the year 1828, and the condition of that sale being for liquidation of the amount of mortgage-money in eleven years,—a year afterwards, in *November*, 1829,



the *Ikrarnamah* which contained the condition making the transaction a mortgage was returned by *Kunhya Lall Doss* and *Russick Lall Doss*, with an indorsement. The indorsement is partly defaced, but it runs thus:—  
 “ (Defaced) the said *mehal*, according to the conditions of the *Ikrar* (defaced), the Government revenue, and interest and the consideration being (defaced); therefore, I have returned this *Ikrarnamah* to *Russick Lall Doss*, the Purchaser. The *Mouzahs* stated in the *Ikrarnamah*, I have absolutely sold. Dated the 27th *Kartick*, 1237. *Kunhya Lall Doss*, *Zemindar*.”  
 It is said that the meaning of this indorsement, which was partly defaced, is, that it amounted to an assertion that the profits of the *Zemindary* were insufficient to pay the principal and interest and the Government revenue, and that, therefore, the *Ikrarnamah* was returned by *Kunhya Lall Doss* to *Russick Lall Doss*.

Now, without going further, their Lordships are compelled to say, that this is a transaction which, upon the face of it, is almost incredible. The property was mortgaged by a usufructuary mortgage, to run over eleven years. The Mortgagee was bound, on the face of the Deed, to pay the Government duty. The mortgage created no personal liability with regard to the payment of the debt. If the debt should be paid in the course of eleven years, the land would be free, if not paid, at all events, the Mortgagor would be in no worse condition than he was at the end of the first year. There is no consideration moving to the Mortgagor for the release of the equity of redemption. It is said that the District in which the property was

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situate was a District which, as regards its produce, was liable to the uncertainties of dry seasons; but, although that might lead to a diminution of the produce in one year, on the other hand, the absence of drought and the presence of moisture in another season might lead to a more plentiful crop, and the uncertainty is one which might have a double bearing as regards the ultimate result of the conditional sale.

But it is further to be observed, that this allegation of the return of the *Ikrarnamah*, and the production of it with the indorsement, was never heard of, until about two years subsequently, when one *Bholanath*, having sued *Kunhya Lall Doss* upon a debt of his own due to *Bholanath*, was taking proceedings to sell this property, or to sell the equity of redemption of it, as being the property of *Kunhya Lall Doss*. Then it was that the return of the *Ikrarnamah* was set up, and that this indorsement was produced. The moment that defence was set up it was challenged,—challenged not merely by *Bholanath* but by the other members of the joint family,—and steps were taken to dispute it. It is true that from circumstances connected with the attempted sale of *Bholanath* going off, the question was not ultimately decided at that time, which is very much to be regretted. The primary Judge decided against the transaction,—decided that it was not a real transaction, but a fraudulent one to defeat the Creditor. There was an appeal to the appellate Tribunal. The appellate Court thought that an investigation of the circumstances should take place, and sent it back for that purpose. The biddings at the sale not having been sufficient to lead to a sale taking place, the Primary Judge thought that it was



unnecessary to pursue that investigation. But, both at that time and at every time since, when the return of the *Ikrarnamah* has been set up, the transaction has been challenged as an unreal and fictitious transaction.

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Their Lordships are of opinion, that it is, on the face of it, an incredible transaction, and they cannot arrive at any other conclusion than that it was a transaction between *Russick Lall Doss* and *Kunhya Lall Doss* for the purpose of defeating the proceedings of the Creditor, *Bholanath*.

Their Lordships must add this further observation: the mortgage or conditional sale of 1828 is clear and undisputed. It lies upon those who desire to set up any title putting an end to the mortgage to establish their case by evidence which is clear and satisfactory. That *onus* certainly is not discharged in this case, and their Lordships, therefore, are of opinion, that on this point also the title of the Appellants is made out, and that, unless on some other ground yet to be considered, they are precluded from redeeming, they are not precluded by the pretended return of the *Ikrarnamah*. Upon this point also their Lordships, in substance, agree with the view of all the Judges in the High Court in *India*.

We come now to the remaining part of the case, which is this: Assuming the title of the Plaintiffs to redeem to be made out, the Respondents, Messrs. *Gisborne & Company*, claim the benefit of the Act of Limitation of suits, No. XIV. of 1859, and assert that the time during which the title of the Plaintiffs to redeem could be put in force has elapsed. In the first place, they say that the Appellants are barred




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by the 13th section of the Law of limitations, that is to say, section which speaks of suits for enforcing the right to share in any property moveable or immoveable, on the ground that it is joint family property. It is not necessary to repeat that section at length, for their Lordships are of opinion, that it is a section which deals with suits between one or some member or members of the joint family and some other member of the joint family, complaining of what we shall term in this Country an ouster of some members by others, or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due. The present case is a case by no means of that description. In the present case the foundation of the title of the Plaintiffs is a mortgage, which, as has been already said, was in its inception, in substance, the mortgage of the whole of the joint family. The circumstance that it is not the whole of the members of the joint family, but only some who now come to recover their share of the property, does not make this a dispute in any way between members of the joint family as to the question of, whether the property is joint or not. It is merely a question of the title of the Plaintiffs to redeem, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.

The Respondents then allege, that they are entitled to the benefit of the 5th section of the same Act, which enacts that, "In suits for recovery from the Purchaser, or any person claiming under him, of any property purchased *bonâ fide*, and for valuable consideration, from a Trustee, Depositary, Pawnee, or Mortgagee,



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the cause of action shall be deemed to have arisen at the date of the purchase." Now, questions of very considerable importance have been raised and argued as to the meaning of this section. Their Lordships desire to say, that the provision of this section is founded, no doubt, upon considerations of high policy,—of a policy which their Lordships do not at all doubt is one which is extremely beneficial to *India*, having regard to the circumstances of that Country. But their Lordships cannot fail to observe, that the provisions of this section are of an extremely stringent kind. They take away and cut down the title, which *ex hypothesi* is a good title of a *cestui que* trust, or of a person who has deposited, pawned, or mortgaged property; they cut down that title as regards the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section, as a person who ought to be protected. Their Lordships think, that in order to claim the benefit of this section a Defendant must show three things:—First, that he is a Purchaser according to the proper meaning of that term; second, that he is a *bonâ fide* Purchaser; and third, that he is a Purchaser for valuable consideration.

Now, what is the meaning of the term "Purchaser" in this section? It cannot be a person who purchases a mortgage as a "mortgage," because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage



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with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage but an absolute title.

Now, it is important in this case to consider how it is that in pleading in the first instance the transaction which here has taken place, the Respondents have put their title. In the sixth head of their statement, they express themselves thus:—"The Defendants, as Purchasers for a just consideration, have all along held adverse possession of the disputed property for more than twelve years without notice of any legal right as co-partners, *i.e.*, if any right had existed pertaining to the Plaintiffs as well as to those persons from whom the Defendants have acquired their right. Thus, in such a case, also, the Plaintiffs' claim is, by reason of limitation, inadmissible." There is no averment there of any fact; it is merely a statement that as Purchasers they are entitled to the benefit of the Act, but when they come to their averment of facts, their statement is this: the second head is, "On the 10th May, 1838, A.D., *Russick Lall Doss* sold the said *mouzahs* to Messrs. *William Shawe* and *William Hawes* for Rs. 17,011, and caused the names of the Messrs. *William Shawe* and *William Hawes* to be entered in the Government records, on the excision of his own name, and Mr. *William Shawe* sold his share to Mr. *William Hawes*, who after that sold it to Messrs. *Gisborne* and Co. and Mr. *C. H. Barnes*, and Mr. *C. H. Barnes* sold his 4 *annas* share to Messrs. *Gisborne* and Co., and mutation of names



took place." This is a statement which puts the title of *Gisborne* and Company exactly in the same position as the title of *Shawe* and *Hawes*. It alleges, that *Russick Lall Doss* sold to *Shawe* and *Hawes*, that *Shawe* sold to *Hawes*, and then that *Hawes* sold to *Gisborne* and Company. It draws no distinction between the various transfers of the property, but puts them all exactly on the same footing. Now, an allegation or a plea of a purchase for value is perfectly well known and understood, and the averments in such a plea are not matters of technicality,—they are matters of substance. In pleading a purchase for valuable consideration in this Country, the very first averment in the plea is, that the person selling either was seized, or alleged that he was seized, for an absolute title, and then the plea goes on to say, that being so seized, or alleging that he was so seized, he contracted to sell, and did sell and convey that absolute title, asserting it to be such, to the Purchaser, who paid his money for that which was thus sold. There is not a fragment of an averment of that kind in the whole of the pleadings in this case. The pleading is perfectly consistent with the transaction having been nothing more than the purchase, that is to say, the transfer of that which was a conditional title, or a title by way of mortgage.

We turn then from the pleadings to see what is the evidence of the transaction in the case. Now, there is no evidence at all of any negotiation for this purchase, of any specification, or schedule, or inventory of what the property was that was to be included in the general purchase of the Factory which was taking place. There is no evidence of any allegation or

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statement on the part of the Vendor which would lead Messrs. *Gisborne* and Company to believe that this was an absolute title which they held to the property in question. The only evidence that there were Purchasers at all is the production of the purchase Deed to which reference is now made.

The purchase Deed contains a recital of the manner in which the Vendor, the first party to the Deed, *Hawes*, had had conveyed to him the various Factories which were to be handed over to *Gisborne* and Company. It then contains this recital of the contract between *Hawes* and *Gisborne* and Company:—  
 “And whereas the said *John Dougal*, *George Dougal*, *Charles Jones Richards*, *Matthew Gisborne*, and *John Richards* have contracted and agreed with the said *William Hawes* for the absolute purchase of the said several Indigo Factories or works and premises hereinafter described, at and for the price or sum of Company's Rs. 210,000, and the same are intended to be conveyed and assured unto the said *John Dougal*, *George Dougal*, *Charles Jones Richards*, *Matthew Gisborne*, and *John Richards*, and their heirs in the manner hereinafter expressed.”  
 It is a contract for the absolute purchase of those premises which are afterwards described in their Deed and intended to be conveyed by it. When we turn to what these premises are, we find first an enumeration of the Indigo Factory: then this addition, “All lands cultivated and uncultivated to the said several and respective Indigo Factories or sets of works respectively belonging or in any wise appertaining;” and further on, “And all the estate, right, title, interest, use, trust, property, possession, possi-



bility, claim, and demand whatsoever, both at law and in equity of them the said *William Hawes, Robert Molloy, and James Cullen* and each of them in, to, out of, or upon the said several and respective Indigo Factories or sets of works, lands, hereditaments, chattels, and premises, and every or any part or parcel thereof."

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Now, assume that there was in this commercial House, as a part of their property in trade, a mortgage securing to them the debt which has been mentioned; assume that that was perfectly well known to every person connected with them, and to the Purchasers. No more fit or apt Deed could have been devised than this for the purpose of conveying a title to that mortgage as the rightful title upon which the property was to be held by the Purchasers. The Deed, in other words, is perfectly consistent with it not having been the intention of any person to this transaction to do more than to hand over this along with all the other property which the commercial Firm possessed, according to whatever might be the right and true title upon which each portion of the property was held. Their Lordships can find in this Deed no evidence of a statement on the part of the Vendor or of any belief on the part of the Purchasers that the property of the *Maheewanwan* estate was a property which the Vendor claimed to hold by what we should call in this Country a fee-simple title.

Under these circumstances, their Lordships think, that the first requisite in the law of limitation is not made out, and that the Respondents here are unable to show, or at all events have not shown, that



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they are Purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon a contract by the Vendor to convey the property to them as an absolute property.

This would be sufficient to decide the case ; for, of course, unless the whole of the three requisites exist, the benefit of the Limitation of suits Act is not obtained. Their Lordships, however, think it right to go further, and to say that they are not satisfied that even if this objection did not exist, Messrs. *Gisborne & Co.* are able to show that they are *bonâ fide* Purchasers. It is unnecessary to impute, and their Lordships would not desire to impute, to Messrs. *Gisborne & Co.* any dishonesty whatever in the transaction, or any moral obliquity in their dealings in this matter. But what their Lordships have to observe is this: Messrs. *Gisborne & Co.* must be regarded as dealing in this case upon one of two footings. Either they were aware in the year 1841, when they took this conveyance, of all that had passed between this native family and the predecessors in title of *Gisborne & Co.* by way of allegation and averment, and claim upon the one side and upon the other, that is to say, they must either have been aware of all the contents of the papers connected with the litigation which had taken place in previous years, or if not aware of the contents of those papers, they must at all events have been aware of the original Conditional sale of 1828, and of the alleged return of the *Ikrarnamah* with its indorsement. It has not been very clear to their Lordships upon which of these two footings the Counsel for the Respondents would desire Messrs.



*Gisborne & Co.* to be dealt with. At one time it rather appeared that their Counsel would wish it to be considered that they knew nothing, or should be taken as knowing nothing but the Conditional sale and the alleged return of the *Ikrarnamah*. At another time their Counsel appeared desirous to refer to certain portions, at all events, of the proceedings which had taken place between the Conditional sale and the year 1841. But assuming that they were not aware of the details of that litigation; assuming that Messrs. *Gisborne & Co.* knew nothing but what has been called the bare title to the property, the Conditional sale, the alleged indorsement upon and return of the *Ikrarnamah*, and the transfer subsequently from *Russick Lall Doss* to *Hawes and Shawe*; their Lordships are of opinion, that looking to the clear and undisputed mortgage in the first instance—looking to the transparent unreality of the transaction connected with the alleged return of the *Ikrarnamah*, the mere production of the indorsement upon that *Ikrarnamah* as the description of the cause for its return was amply sufficient to put any persons in the position of Messrs. *Gisborne & Co.* upon an inquiry and consideration as to whether that transaction could be a real transaction, or whether it was a transaction which could form part of the title of a Purchaser. On the other hand, if, as seems to have been rather the opinion of the learned Judges of the Court below, and certainly seems much more consistent with all the facts of the case,—if it be taken that Messrs. *Gisborne & Co.* were perfectly aware of all the accounts in the Factory and of all the details of the litigation, and of all the claims that

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had been made before with regard to this property, then their Lordships consider that their attention was pointedly and distinctly called to the infirmity of title in this case, and that, with their attention so called, they could not be considered to be *bonâ fide* Purchasers.

Therefore, upon both grounds, upon the ground that they are not Purchasers within the meaning of the limitation law, and upon the ground that, if they were Purchasers they are not, in the sense in which the words are used in the Act, "*bonâ fide* Purchasers," their Lordships think that Messrs. *Gisborne & Company* are not entitled to the benefit of this Act of limitation.

It would perhaps be right that their Lordships should advert also to an argument which was adduced, although not very warmly pressed, that under the 10th section of the Limitation of suits Act, Messrs. *Gisborne & Co.* might find protection. The 10th section says, "In suits in which the cause of action is founded on a fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged." This, in their Lordships' opinion, is not an action founded upon fraud in that sense. It is an action upon a title to recover the possession of property to which the Plaintiffs are entitled, which clearly they must recover, unless there be some specific protection given to those now in possession of it by virtue of the other sections of the Act to which reference has been made.

This being the opinion at which their Lordships have arrived, they will humbly recommend to Her

Majesty that the decree of the High Court of *Calcutta* should be reversed, and that in place of it an Order should be made dismissing the appeal to the High Court, and dismissing it with costs. That would set up again the decree of Mr. *Madocks*, the *Zillah* Judge. Their Lordships are content to allow that decree to stand, and are unwilling to enter upon any criticism of the precise form of it, because no argument has been adduced before their Lordships upon the footing that, supposing the decree in substance to be right, any modification should be made of it in detail. Their Lordships, therefore, will leave that decree to be the decree in the cause, and will only further add that the Appellants should also have the costs of this appeal.

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MANTAPPA NADGOWDA ... *Appellant;*

AND

BASWUNTRAO NADGOWDA ... *Respondent.\**

*On appeal from the High Court of Judicature at Bombay.*

20th Jan.,  
1871.

A., one of three Brothers of the *Nad Gowdki* family, in *Bombay*, in which family it was alleged, a custom existed (the estate not being a *Raj* or *Princi-*

IN this appeal the suit was brought by the Respondent in the Court of the *Sudder Ameen*, at *Bagulkot*, to recover the sum of Rs. 567, claimed by him as the value of a one-third share of a family estate described as a "*Nad Gowdki*," *Gowdki Enam*,

° Present :—Members of the *Judicial Committee*—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

pality) by which the eldest Son succeeded to the estate, and the younger Brothers received maintenance, or an allotment out of the estate in lieu of maintenance; received an allotment of land from his elder Brother. In consequence of disputes as to the allotment, A afterwards executed a release in his elder Brother's favour, renouncing all share in the family estate. The Deed was written on unstamped paper, but it was stipulated in the Deed that A. should get it stamped which was done, but, instead of an *ad valorem* stamp, a stamp of 2 annas only was impressed. A., after having been in possession of his allotment for ten years, brought a suit against his elder brother, claiming a share in the family estate, according to the ordinary Hindoo law, and impeaching the Deed of release as a forgery. The *Sudder Ameen* upheld the Deed. On appeal to the Civil Court of *Dharwar*, A. for the first time objected to the reception of the Deed as evidence, as not being impressed with a stamp sufficient to cover the value of the property allotted to him. That Court admitted the Deed as evidence of the release. On appeal, the High Court also upheld the Deed, but, under *Bom. Reg. XVIII. of 1827*, sects. 10, cl. 1, and 12, cl. 2, reduced its effect and operation by making it a Deed of release for so much only of the property comprised in it as would be covered by the 2 anna stamp impressed. Held by the *Judicial Committee*, reversing such decree:—



Government land and Houses in several villages of the *Hoongoond Talooka*."

The Respondent was the second, and the Appellant the eldest Son of one *Kidiganappa Gowda*, deceased. There was no dispute about the relationship of the parties.

The claim of the Respondent, as laid in his plaint, was based upon the general rule of Hindoo law, that all Sons share equally in any property descended from a common ancestor.

The Appellant, by his answer, stated first, that for a series of generations no share had ever been allowed to *Bhai Biradars* (kinsmen) in the *Nad Gowdki* and *Gowdki* estate of the family, and that there were accordingly many branches of the family, who having failed to obtain shares, held only a part of the landed property received in lieu of maintenance, their members living separate, as their predecessors had lived for hundreds of years before the date of the suit. Secondly, that the Respondent, as one of the kinsmen, had accepted a small part of the landed property and a House by way of maintenance, and had lived apart from the Appellant for ten or twelve years, but that on his complaining that such provision was insufficient, he had received an additional allowance of land, whereupon he had executed a Deed of release to the Appellant, on the 17th of *October*, 1852, giving up all pretensions to the *Nad Gowdki* and *Gowdki* offices.

First, that (without deciding, whether such family custom as pleaded existed,) the Deed of release constituted a transaction in the nature of a family arrangement, and was properly received in evidence, and was binding on A.

Secondly, that the course adopted by the High Court in respect to the insufficiency of the stamp was erroneous, as it was the duty of that Court (1) either to have refused to admit the Deed as evidence for want of a proper stamp, or (2), in the alternative, to have required the Deed to be properly stamped before admitting it as evidence.

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The Appellant, in his answer, further stated, that the Respondent had falsely described the family estate in his plaint, both in mentioning as part of it certain lands which had been granted away by the Appellant's ancestors, and which the family had ceased to occupy for many years, and in omitting to mention so much of the estate as was in the possession of the Respondent, a third of which, on his own showing, ought to have belonged to the Appellant.

The Appellant put in evidence the Deed of release executed in his favour by the Respondent, which was in these terms :—

“I, *Baswuntrao*, Son of *Kidiganappa*, resident at *Kasba Kelur*, execute a Deed of release to the following effect. As differences arose in the family between you and me, I live separate, my continuance in the House being impossible. As it was customary from the time of our ancestors for grants for maintenance to be allowed, I asked for land for the support and maintenance of my family, and accordingly you have given me for maintenance the land and Houses described below” (which were described, and proceeded): “You have thus made me a grant of land and a House. I shall have no connection with the payment of the debts contracted both by ancestors and by yourself. Whatever debts there may be you will pay or receive payment. You, as being born in the elder line, will in the same manner as the first-born descendant used to do from the time of our ancestors, enjoy the *Nad Gowdki Wuttun*, the *Bodihall* and *Kadapaty* estate, the *Halli Chasrat* and the *Chasrat* of this *Kusba*, the land of *Gowdki Wuttun* and whatever else may be, together with the *rasoom* (cash allowance or fees), *Hak Bab*, and the rights and



privileges (of the hereditary office). I have no right to claim them. You will continue to pay as heretofore the *Nad Gowdki*, *Mahal Foodee*, and the *Gowdki Foodee*, and enjoy the whole of the *Wuttun* for yourself. You will allow no dispute to be raised about the land and House now granted to me. I shall enjoy the said House and land, and live in peace : with the exception of the two, namely the fields and the House. I have no right over the rest of the *Wutnee* land and property ; you will not be liable for the payment of any debts, &c., which I may contract. As there was no stamp available for the occasion, I have drawn this up on plain paper. I promise to get the stamp within eight days from this date, and write the Deed upon it, and take this paper back. In case I should fail to procure the stamp, and give the Deed written upon it, I agree to pay all the expenses and the penalty which may be incurred for getting this paper stamped. To this effect I deliver and sign this Deed of release of my own free will and in my sound mind. The date this *Ashwig Sooda*, 5 *Paridhavi Sumoussoar Shuke*, 1774 (October 17th. 1852)." To this document a mark was affixed, after which was the following :—" This mark affixed by *Baswuntrao*." Signed, *Nursing Rao Despande, Hoongoond*.

At the hearing of the suit before the *Sudder Ameen* the Respondent disputed the Deed of release, on the ground of genuineness only, maintaining in his deposition that he had known how to write from his boyhood, and could have written his signature in the character (*Canarese*) in which the Deed was drawn up, and denying, therefore, the authenticity of the Deed in consequence of the mark attached to it. In support of his contention that he was entitled as the Appel-

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lant's Brother to a third share of the estate, and not to maintenance only, the Respondent examined Witnesses. The first deposed that he knew nothing of the matter, while the second said that in the *Nad Gowdki Wuttun* an allowance was made to the Brothers for their maintenance. The Appellant, on the other hand, called several Witnesses to prove the authenticity of the Deed of release and the custom of the family to allow maintenance to younger Brothers. On the question of the family custom, the Appellant's Witnesses were unanimous. The Appellant himself deposed to having, in various instances, made allowances for maintenance to kinsmen, instancing the village of *Chickwadge* as having been given to *Mantappa*, Son of *Parwat Gowda*, and the village of *Idalji* to *Mitapa*, the Brother of *Sangapa*. These two persons were called as Witnesses, and confirmed the fact of these grants having been made to them for maintenance only. *Malappa*, the younger Brother of the parties to the suit, was also called, and in the course of his evidence said, "In my family maintenance is granted, but no share is allowed by custom."

On the 7th of June 1862, the *Sudder Ameen*, (*Tir-matrao Venktesh*,) gave judgment, dismissing the suit, with costs; the material part of his judgment being as follows :—"On the fourth issue the Court holds, that *Baswuntrao* did execute the Deed of release to *Mantappa*, because the Witnesses depose that *Baswuntrao*, having got written the Deed of release, and having affixed his mark to it, caused it to be attested and delivered it over. On the other hand, it is stated by members of the family and some of the Witnesses, that *Baswuntrao* formerly did not know how to write; that he learned to write when he was appointed



to manage police business; that there is no custom of allowing shares to Brothers in the *Nad Gowdki* family, but that maintenance only is allowed; and that *Baswuntrao* having received maintenance accordingly lived separate. *Baswuntrao* contends, that he knows how to write and that the Deed of release does not bear his signature; but he states in his deposition that he knows how to write his signature only. On looking at his signature it does not appear to be a settled hand. The signature exhibits the appearance of one having been newly learned to write. *Gerry Mallappa*, a Witness for *Baswuntrao*, does not state that *Baswuntrao* knew how to write from his boyhood. He simply says, that *Baswuntrao* has known for the last twelve years to write his signature only. Neither does the decree produced by *Baswuntrao*, prove that *Baswuntrao* knew how to write. A claim brought on a Bond, which bore his mark, was thrown out because the Bond put in as evidence to support the action was not proved. This circumstance alone would not prove that *Baswuntrao* knew how to write. *Baswuntrao* brings forward Bonds dated in *Shuke*, 1770 and 1771, purporting to have been executed by him to third parties, and bearing his signature; but he does not show how he came to be possessed of the Bonds granted to others. Besides this, on a careful examination of these papers on both sides, they appear to be new ones, and not so old as thirteen or fourteen years. The copy of the *Vakeeletnamah* (Power of Attorney) produced by *Mantappa*, and authenticated by the signature of the Assistant-Judge, proves that *Baswuntrao* affixed his mark and not his signature to a *Vakeeletnamah*, executed by him in suit, No. 204 of 1847. It is, therefore, estab-

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lished that *Baswuntrao* has only recently learned how to write. Besides this, *Baswuntrao* holds, at present, possession of the land called *Kala Hola* and *Killeda Holla*, both in the village of *Kelur*. He has also built a House at *Kelur*. *Baswuntrao* admits, in his deposition, that he has not included those lands in his plaint. *Mantappa* produces a petition presented by *Baswuntrao* at the *Talooka Cutcherry*, in 1861, the purport of which goes to show that there was a dispute regarding the boundaries of these very lands. These are the fields alluded to in the Deed of release. In the manner aforesaid the Deed of release is proved. It is to be observed chiefly that the lands therein referred to are in the possession of *Baswuntrao*, and that he has not included them in the plaint, a circumstance which strengthens the authenticity of the Deed of release. For all these reasons it appears that the Deed of release was really executed."

From this decision the Respondent appealed to the Civil Court of the *Zillah* of *Dharwar*, and for the first time objected to the Deed of release, on the ground of the insufficiency of the stamp on the Deed.

On the 28th of *October*, 1864, Mr. *C. F. H. Shaw*, the Acting Judge of the Civil Court District of *Dharwar*, gave judgment in favour of the Appellant, confirming the decision of the *Sudder Ameen*, and dismissing the appeal with costs. The Judge held, with respect to the objection as to the insufficiency of the stamp, that according to the old law it was only necessary for the stamp to prove the actual property delivered. In his judgment he observed: "*Baswuntrao* sues his Brother for a one-third share of the *Hoongoond Nagowda Wuttuns*, but he admits that



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he has lands not entered in his plaint, and that the Respondent, *Mantappa*, holds others for which he has not preferred his claim to share. *Mantappa* meets the suit by denying the custom of the family to divide the estate, and his evidence to show that the different members receive merely *Potgee* maintenance is stronger far than the Witnesses called by *Baswuntrao* to prove the custom of division, and the Court places more reliance on *Mantappa's* plea, confirmed as it is by the Exhibit No. 21, a decision of Arbitrators rejecting a similar claim to the present as far back as the year 1829. But had even custom allowed the division of the family estate, there was no reason why the Appellant and the Respondent should not make a special agreement for enjoying the *Wuttun*, and pass a *phareekut* (release), such as Exhibit No. 10; and the argument that this *phareekut* is passed on insufficient consideration is worth nothing when the Appellant allows that he holds other lands besides those referred to in it. In fact the *phareekut* proves the additional consideration for passing it. That the *phareekut* is a genuine document the Court considers established from the fact, that the date of stamping is earlier than that of the action, and which confirms the deposition of *Mantappa*, Exhibit No. 54."

From this decision the Respondent appealed to the High Court at *Bombay*, without advancing any new grounds in support of his claim, and on the 26th of *July*, 1865, judgment was delivered in favour of the Respondent, reversing the decisions of both the Courts below.

The High Court, consisting of Messrs. *Forbes* and *Newton*, based their decision upon grounds different from those relied upon by the Respondent, and held



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that sufficient proof had not been given by the Appellant of the custom for which he contended, and that even if such a custom did exist, it had never been and could not be allowed to override the ordinary Hindoo law on the subject, unless in the case of a *Raj* or Principality, where it was shown to have descended undivided to the eldest male heir during several generations, as in the cases of *Rawut Urjun Sing v. Rawut Gunsiam Sing* (5 Moore's Ind. App. Cases, 169), and *Baboo Gunesh Dutt Singh v. Maharaja Moheshur Singh* (6 Moore's Ind. App. Cases, 164), and Appeal No. 2, of 1864. In the case of a *Raj* the Court admitted the law of primogeniture would be unhesitatingly applied where the custom warranted it. On the question of the Deed of release, the High Court held, that the judgments of the Courts below as to its genuineness as a question of fact was final. But they proceeded to say, that—"Under the provisions of cl. 1, sec. 10, of *Bom. Reg. XVIII.* of 1827, it requires a stamp, and under cl. 2, sec. 12, of the same Regulation, as it is a writing not for a specific sum, it might have been executed on a stamp of the value of eight rupees, or if written on a stamp of less value, may be made effective only up to the utmost sum covered by such stamp under the rule contained in the previous clause of the same section. It was originally written on plain paper, and contains an agreement for subsequent stamping, which was permitted by sec. 13 of the same Regulation; a stamp of two *annas* has since been impressed on it, and by this, under the clause previously referred to, and Appx. B to the same Regulation, the highest sum or value that can be secured is Rs. 64. To this extent only, therefore, the Deed of release is valid,



and to this extent it operates to reduce the Plaintiff's claim."

Dissatisfied with this decision, the Appellant twice applied for a review of judgment but failing to obtain it, he petitioned the High Court for leave to appeal to Her Majesty in Council which was granted.

The appeal now came on for hearing. As the Respondent did not appear the appeal was heard *ex parte*.

Sir *R. Palmer*, Q. C. and Mr. *H. C. Merivale*,  
for the Appellant.

There are two questions; the first as regards the family custom, that younger Brothers and kinsmen are entitled to maintenance but not to a share of the family estate, thus superseding the general rule of the Hindoo law of succession, and the second, respecting the validity of the Deed of release and the sufficiency of the stamp thereon.

Upon the first point, as a question of fact, it was proved by the Respondent's own admission in the Deed of release; by the Arbitrator's Award showing the *Wuttun* to be undivided, and also by the parol evidence, including that of the Younger Brother, who had accepted maintenance, that it was the custom in the Appellant's family, for the eldest Son to succeed to the family estate, and that the younger Brothers and kinsmen were entitled to maintenance only, or an allotment of property in lieu thereof, and not to a share of the estate, according to the ordinary Hindoo law in force in *Bombay*. The High Court had no authority to review the facts of the family custom which was one of evidence only, *Hurreechurn Mookerjee v. Jadunath Ghose* (a). There are similar customs

(a) 10 W. R., 153.

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recognized in Hindoo families which supersedes the general Hindoo law. *Tara chund v. Reeb Ram* (a); *The Government v. Monohur Deo* (b); *Steele's* on the Law and customs of Hindoo castes in the *Dekhun*, tit. Inheritance, sect. LXXI, p. 229 [Ed. 1868].

Secondly, the Respondent, in pursuance of such custom, and to avoid litigation in the family, executed the Deed of release in favour of the Appellant, by which, in consideration of the allotment of part of the family estate for his maintenance, he renounced all further claim thereto. This Deed, we submit, was a valid and effective release of all the Respondent could claim out of the family estate, but the High Court, while allowing its genuineness, treated it as only partially valid, on the supposed insufficiency in the amount of the stamp impressed on the Deed. According to the High Court's construction of *Bom. Reg. XVIII.* of 1827, sec. 10, cl. 1., and sec. 12, cl. 2, the Deed was admissible in evidence only with respect to the value of the property covered by the stamp. A construction at variance with all authorities, *Doomah Sahoo v. Jomarian Loll* (c); *Ram Brem Lal v. Abluckh Singh* (d); Acts, No. XXXVI. of 1860, and No. X. of 1862 (e). But the objection to the sufficiency of the stamp was never raised by the pleadings or in issue in the Court of First Instance, and no opportunity was given to the Appellant to remedy, if necessary, such insufficiency. By the 13th section of

(a) 3 Mad. High Court Rep. 50.

(b) W. R., 1864, p. 39.

(c) 12 W. R., 362.

(d) Marsh., *Ben. App. Cases*, 267.

(e) See, also, the Imperial Statute, 17th & 18th *Vict.* c. 83, sec. 27, which enacts, that an instrument liable to stamp duty is admissible in evidence, in criminal proceedings, although it may not have the stamp required by law impressed thereon.



the *Bom.* Reg. XVIII. it might even now, if necessary, be properly stamped. *Macpherson's Civil Proc.*, ch. III. pp. 139, 140, 141 [Ed. 1871]. The High Court, therefore, was wrong in so dealing with the Deed. Even if the Deed was not receivable as a release, it ought to have been admitted as evidence as a memorandum of agreement for a family arrangement afterwards carried out. In *Evans v. Prothero* (a), Lord *St. Leonards* held, that a document containing all the requisites to make it a valid contract, and purporting to be a receipt, though by reason of its being insufficiently stamped inadmissible as such, could be received as evidence of the contract.

Judgment was delivered by

The Right Hon. Lord CAIRNS :—

The first question raised in this case is as to the existence of a custom in the *Nad Gowdki* family by which, on descent, where there was more than one Son, it is alleged, that the younger Brothers did not, according to the ordinary Hindoo law, share with the eldest Son in a division of the property, but received maintenance, or an allotment of property in lieu of maintenance, in place of sharing in the whole property. Their Lordships feel a difficulty in knowing exactly what the precise terms of the custom are which the Appellant desires to rely upon. But further than that, after considering the evidence, their Lordships find no sufficient evidence of a special custom of the kind urged at the Bar to have prevailed in this family. They, therefore, think it unnecessary to consider the question raised by the High Court, as

(a) 1 De G. M. & G., 572.

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to whether, in that part of *India*, a custom of the kind suggested might or might not be valid. That is a question which would properly arise for determination as soon as it was ascertained that in point of fact such a custom prevailed. Their Lordships, however, find sufficient materials which will enable them to dispose of this case from the dealings that have taken place between the Appellant and the Respondent.

It appears that there were three Brothers, the Appellant being the eldest, the Respondent the second, and another Brother, not a party to this suit, who was the third. It appears that upon the descent of the family property, the third Brother received an allotment of land in lieu of maintenance, and did not claim to be, and was not allowed to be, a sharer in the family property. It appears further, that the Respondent, on the 17th of *October*, 1852, entered into an engagement, evidenced by a Deed of that date, between himself and the Appellant, his elder Brother, to this effect. [His Lordship read the Deed, *ante*, p. 26.]

Now, if that is a valid Deed, if it is not impeachable on the ground of fraud or any other ground, it appears to their Lordships that there is a clear and distinct contract between the Appellant and the Respondent, by which the Respondent accepts an allotment of specific land and a House; obtains certain benefits by being relieved from the family debts, and makes stipulations with his Brother which are binding and enforceable, —which would be binding and enforceable probably in any case, but are still more so when the transaction is one in the nature of a family arrangement. It is true that the arrangement is made upon the expression of belief on the part of the Respondent that he



was acting in accordance with the custom of the family. It is very probable that that belief was founded upon fact, and the existence of the belief on his part does not in any way detract from, but rather adds to, the stringency and the effect of the family arrangement. It ought to be added that this Deed having been executed on the 17th of *October*, 1852, the Respondent appears to have entered into possession of the allotted property, and to have remained in possession until the year 1861, when the suit was instituted, without any complaint on his part except that the portion allotted to him by way of maintenance was too small, which complaint appears to have been met by a further portion being allotted to him for the purpose of increased maintenance.

Therefore, if this be a valid document, and not open to challenge on the ground of fraud, or upon any other ground, their Lordships would be slow to fail to give effect to a family arrangement of the kind thus expressed, followed, as it has been, by enjoyment and possession for a period of ten years.

Well, then, is there any ground for impeaching this document? Now, in the first place, it is to be observed, that in the plaint filed by the Respondent there is no challenge of this document whatever. The plaint does not seek to set aside the Deed on the ground that he was misled, that he had not sufficient advice or that he was ignorant of his rights at the time he executed the release. But when the document was presented as a defence on the part of the Appellant, then the Respondent challenged it, not upon the ground of fraud or ignorance of his rights, but upon the allegation that the document never had

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existed at all, and that he never had signed such a document. Upon that issue, evidence was entered into on both sides. The two Courts before whom the case was first heard, the Court of First Instance and the Court of first appeal, weighing that evidence, considering it very fully and very carefully, disbelieved the evidence of the Respondent, and held that the Deed was beyond doubt a genuine document executed by him. The second Court of appeal did not differ from the conclusion arrived at by the first two Courts, but the second Court of appeal made this objection to the document. It appeared that in the first instance it had not been stamped at all: indeed, in the face of it, it professed to be a document written on plain paper, the stamp for which was afterwards to be supplied by the Respondent. After it was first produced it appears to have had a stamp of two *annas* impressed upon it, and the High Court took notice that that was an insufficient sum to cover the amount of the property comprised in the Deed. Now, admitting that the stamp was insufficient, which may be assumed, it appears to their Lordships, that there were two courses which ought to have been taken by the High Court. The Court might have refused to admit the document for want of a proper stamp. Their Lordships do not say that that would have been a correct course, but it would have been a possible course; or they might under the Acts and Regulations for that purpose, have required the document to be properly stamped, and the penalty paid into Court for the purposes of the revenue. As to rejecting the document *in toto* for want of a stamp, there would have been this serious difficulty, that there does not appear to have been any



objection raised to its admission in the Court of First Instance, and it is difficult to see how, that being the case, it would have been a just course to have rejected *in toto* the document in the Court of last appeal. However, the Court of last appeal in *India* did not take either of those courses. It did not reject the document. It did not do what obviously would have been the more correct course, require the Deed to be properly stamped and the penalty to be paid, but it left the Deed as part of the evidence in the case, just in the way in which it had been placed among the evidence by the Court of First Instance, and it qualified its effect, and the extent of its operation, by making it a Deed of release, releasing so much of that which the Plaintiff might otherwise claim, as would be covered by the insufficient stamp of two *annas*. Their Lordships cannot do otherwise than express their surprise at the course thus taken, which appears to them to be entirely without precedent, without principle, and without authority.

Their Lordships, therefore, find the Deed as part of the evidence in the suit. They are prepared to say that, being evidence in the case, they think the full and natural weight should be given to it as part of the evidence in the cause; and being of that opinion, they have already said that the Deed not being challenged on the ground of frauds, or on the ground of any ignorance of rights, is the expression of a valid family contract between the two Brothers, acted upon by both of them and ought not now to be disturbed.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed, that

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the decision of the High Court should be reversed, and the first decision which dismissed the suit of the Respondent, be restored, and that the Appellant should have his costs of this appeal as well as of the hearing in the Court of second appeal in *India*.

SYUD TUFFUZZOOL HOSSEIN KHAN ... *Appellant* ;

AND

RUGHOONATH PERSHAD and LADLEE } *Respondents.\**  
PERSHAUD ... .. }

*On appeal from the Judicial Commissioner of Oude.*

3rd Feb.  
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Under a  
remit from  
the Privy  
Council to  
the Court of  
First Instance,  
to refer to ar-  
bitration, with  
the consent  
of the parties,

the accounts of a partnership Firm, a reference under a submission and Order of the Court was duly made to Arbitrators. Before any Award made, the "rights and interests" of one of the parties in the Award were by Order of the Court sold by auction in satisfaction of a decree against him made in another suit by a third party. Held that the expectant claim under an inchoate Award was not "property" within the meaning of sect. 205 of Act, No. VIII. of 1859, and was not saleable in execution of a decree.

*Semle*, a mere right of suit is not "property" but a title to recover future property.

THIS suit was brought by the Appellant against the Respondents to obtain a decree to establish his rights as Purchaser at an auction sale in execution of a decree, of the right, title, and interest of the

Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James.



deceased Father of the Respondent, *Rughoonath Pershad*, as partner with another person in a Firm or co-partnership of Merchants and Bankers, being wound-up, and an account being then taken by Arbitrators under a submission, and also under an Order of the Court of the Civil Judge of *Lucknow*, to ascertain the amount to be paid in money as his proportion or share of the co-partnership assets.

It appeared, that a former suit had been instituted in the Civil Court of *Lucknow* by one *Ramnath*, the late Father of the Respondent, *Raghoonath Pershad*, against *Sheonath*. The parties were partners trading as Merchants and Bankers, and the object of the suit was for a general account and a partition. The Civil Judge, in opposition to the protest of *Ramnath*, referred the accounts to Arbitrators, and the Court afterwards adopted the Award of the Arbitrators. His decree was confirmed by the Judicial Commissioner of *Oude*, and against that decree an appeal to Her Majesty in Council was brought (a). In that appeal the question raised and adjudicated was, whether it was competent to the Court under the Civil Procedure Act to refer the questions to the Arbitrators nominated by the Court against the protest. The Judicial Committee reversed the Judgment of the Judicial Commissioner, and remitted the suit to *India*, with directions as to winding up the outstanding concerns of the co-partnership, leaving it open to the Court, if both parties consented, to refer any question in respect of their respective rights in the outstanding debts to Arbitrators ; but if the parties did not consent to any such mode of settling their disputes, then it directed that it was the duty of the Court to

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(a) See *Sheonath v. Ramnath*, 10 Moore's Ind. App. Cases, 413.



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adjust the accounts still unsettled between them in a regular way, by taking an account (a).

Under the Order in Council made on this judgment, *Sheonath* and the Respondent, *Rughoonath Pershad*, the heir-at-law of *Ramnath*, who had died pending the proceedings, presented a petition to the Court, stating that they had agreed to abide by the Award of certain Arbitrators with regard to the outstanding debts of the joint Firm that had been realized, and the Court thereon referred the matter to the Arbitrators named.

It appeared that in the year 1865 another and distinct suit was instituted in the Civil Court of *Lucknow*, in which one *Sah Banarsee Doss* sued *Ramnath*, and a decree was made in favour of the Plaintiff in that suit for Rs. 683 : 3 : 0, and under an Order of the Court, an attachment, at the instance of the Decree-holder, was ordered of the "claim of *Ramnath v. Sheonath*, which has been returned by the Privy Council for settlement of the accounts." As the judgment debt was not paid, the Court, before the making of the Award by the Arbitrators, directed the claim in *Ramnath v. Seonath*, which was remanded by the Privy Council for settlement of accounts, and had been referred to Arbitration, to be put up for public auction, and at the sale thereof the Appellant purchased the rights and interests of *Ramnath* in that suit for the sum of Rs. 1,350. He afterwards intervened in the suit of *Sheonath v. Ramnath*, as such Purchaser, submitting that the Respondent, *Rughoonath Pershad*, had no claim in that suit, as he had purchased his rights and interests at public sale. This application was resisted, and the Court afterwards rescinded the auction sale. By the Award of the Arbitrators the sum of Rs. 34,000 was

(a) See *Sheonath v. Ramnath*, 10 Moore's Ind. App. Cases, 429.



awarded to the Respondent, *Rughoonath Pershad*. In consequence the present suit was brought by the Appellant.

By the decree of Mr. *Fraser*, the Judge of the Civil Court of *Lucknow*, it was declared that the Respondent, *Rughoonath Pershad*, the judgment Debtor, who had urged the irregularity and invalidity in the procedure and sale, had made no effort to postpone or stay the sale, but on the contrary had allowed it to go on, his own Agent having attended as a bidder thereat; and, that the sale being of movable property became at once complete and absolute on payment of the purchase-money and the granting of the receipt for the same to the Purchaser, the Appellant, according to the provisions of sect. 251 of the Civil Procedure Code, Act, No. VIII. of 1859.

On appeal Sir *George Couper*, the Judicial Commissioner of *Oude*, reversed that decree, declaring and decreeing that Construction 1,248 of the *Sudder Dewanny Adawlut*, dated in 1839 and 1840, which declared that by law "unproved claims" of B against C were to be considered "as assets available in the execution of A's Decree against B, and be sold by action," was repealed by the Civil Procedure Code, Act, No. VIII. of 1859; and that therefore the attachment and sale of the right, title, and interest of the partner aforesaid, dependent, as the Judicial Commissioner held, on an inchoate Award, was not "property" susceptible of sale under section 205 of that Act; and further, that the sale to the Appellant was invalid, because the property was not attached in the manner prescribed by law for such property—holding it to consist of "debts" within the meaning of section 236 of that Act, and that the

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mode of attaching debts, prescribed by that section, had not been followed by the *Nazir*.

The appeal was from this decree. No appearance having been put in by the Respondents, the case was heard *ex parte*.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant,

Contended, that by the law and parties of the Courts in *India*, the right, title and interest of a partner in a trade or business could be attached and sold in execution of a money decree against such Partner, even if the assets of the partnership could not be ascertained or fixed until an account then pending before Arbitrators, or the opinion of the Court, had been taken, and the relative proportions of the co-partners determined by decree of the Court and Award of the Arbitrators. They referred to Construction by the *Sudder Dewanny Adawlut*, No. 1,248, dated 1839 and 1840, Civil Procedure Code, Act, No. VIII. 1859, sects. 205, 236, 251. And, as to the irregularity of the sale, they cited sect. 252 of that Act.

The case stood over for consideration.

Their Lordships' judgment was now delivered by

The Right Hon. the Lord Justice JAMES.

This is an appeal from a decision of Sir *George Couper*, the Judicial Commissioner of *Oude*, reversing a decree of Mr. *Fraser*, the Judge of the Civil Court at *Lucknow*, given in favour of the Appellant, the Plaintiff in a suit which he had brought to set aside an alleged illegal Order of Mr.

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*Smith*, the officiating Civil Judge of that City. The Order in question cancelled a judicial sale in execution of a decree for a money demand made in a suit in which one *Sah Banarsee Doss* was Plaintiff, and *Ramnath*, the Father of the first Respondent, was the Defendant; in which suit the Plaintiff recovered the sum of Rs. 683. 3 annas. The Decree-holder, *Sah Banarsee Doss*, unable to obtain payment of this demand, attached as the property of his Debtor a certain claim in a pending arbitration between *Ramnath*, the judgment Debtor, and *Sheonath*, his former partner. He proceeded, as if in the regular course of such executions, to its sale in satisfaction of his decree. It was sold accordingly by auction by the *Nazir* of the Court, and the Appellant became the Purchaser of it for the sum of Rs. 1,350.

The claim was thus described in the notice of sale :—

“The claim of *Ramnath* v. *Sheonath*, which was remanded by the Lords of the Privy Council for the settlement of accounts, and has been referred to Arbitrators.”

The sale took place on the 25th of *October*, 1866, and on the following day the Arbitrators made their Award, and awarded to the first Respondent, as the Son and representative of *Ramnath*, then deceased, the partner of *Sheonath*, the sum of Rs. 34,000, and the outstanding debts they awarded to *Sheonath*. These outstandings were partnership debts due to the late Firm, in respect of which neither partner, however, had incurred any special liability to the other. The submission, which was in the most general terms, and conferred the most ample discretionary powers on the Arbitrators, contained the

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following expressions: "The case has been made over to you for your decision. We, the parties concerned, agree to have our cause decided among ourselves, and are willing to abide by an amicable adjustment. We, therefore, of our own free will and accord declare and do state in writing that in any way whatsoever our case may be decided by you, the same will be accepted and recognized by us."

The Appellant claims to be entitled to the sum of Rs. 34,000, as Purchaser of the same at the auction sale for the sum of Rs. 1,350. The sum so claimed, however, had no existence at the time of the attachment; it was not a debt nor liability at that time from *Sheonath* to *Ramnath's* Son; it was a debt created by the Award, and not the liquidation of a preceding unliquidated demand *ex contractu*. It was (amongst other matters) an Award of an extinguished share of debts which were till then debts due to the Partners jointly, and became under the Award, the sole property of *Sheonath*. It was quite competent for the Arbitrators to award money to be paid by, instead of to, the judgment Debtor, and to give him the outstanding debts. The attachment was not of a several share of the outstanding debts; had such a claim as that been made it should have been asserted by a different notice, directed also to the original Debtors. On its effect, if so made, it is not necessary to decide.

Mr. *Smith* set aside the Order directing the sale. He made his annulling Order *ex parte*, without any notice to the Appellant, who was in ignorance of, and had no opportunity of opposing it. The Appellant, on becoming aware of the Order, petitioned Mr. *Smith* against it. His petition was received; it stated



in detail all his objections to the Order, which were fully considered; Mr. *Smith*, however, adhered to his opinion, and sustained his Order.

In consequence of this decision by Mr. *Smith*, the Appellant brought a regular suit to set aside the Order annulling the purchase, and to enforce his rights as Purchaser. Mr. *Fraser* decreed the suit in his favour; but, on appeal to the Judicial Commissioner, that decree was reversed. From this last decree the present appeal has been brought.

The decision of this appeal depends on the true construction of section 205 of Act, No. VIII. 1859; but before their Lordships enter upon the consideration of the effect of that section they will dispose of some other objections which were urged against Mr. *Smith's* Order.

The Judge proceeded, it is said, in reversing the sale, on the ground of irregularity alone. The real objection, however, to this sale, if sustainable in law, is not one of irregularity; it is one which, from its nature, as founded on a want of power in the Court, affects equally, if it be valid in law, the title of a Purchaser under a strictly regular sale.

Assuming the decision under appeal to be correct, the sale would be simply inoperative, though uncanceled.

This answer substantially disposes of another objection which was directed against the propriety of Mr. *Smith's* act in cancelling the sale. The act itself may have been right, though he erred in his mode of doing it.

Mr. *Fraser* appears to have supposed a Judge of that Court unable to correct his own error, in sending

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forth, *per incuriam*, an invalid Order which he would not have made if duly informed.

To proceed, so far as the practice of his Court will allow him to recall and cancel an invalid Order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the Suitor. It would be a serious injury to the Suitor himself to suffer him to attempt to execute an inoperative Order.

If, then, the decision appealed from be correct, no other objection can reasonably be urged against the course adopted by Mr. *Smith* than this, that he did irregularly without notice, that which it was his duty by a more regular course to do.

Their Lordships are satisfied, however, that no harm or wrong was done by Mr. *Smith's* suspending *ex mero motu* an Order which appeared to him *ex facie* improper—and this was, in effect and substance, what he did.

The section on the true construction of which the decision of this appeal depends is the 205 of Act, No. VIII. of 1859. After an enumeration of many specific subjects of attachment of various natures, the section, at its close, employs very general words, as if to include all property not enumerated. These words, “and all other property whatsoever, movable or immovable,” are, in substance, the same with words in the old Writ of sequestration pending a suit under the old procedure of the Company's Courts in *India*. See the form in *Macpherson's Civil Procedure*, p. 196 [3rd Ed.] This Writ issued pending a suit to restrain an alienation commenced, or sup-



posed to be about to be made, on the part of a Defendant in fraud of his Creditor.

Of this Writ and the ordinary Writ in execution, the Author says that scarcely any kind of property is exempt from its operation. The old Writ of seizure in the same Courts has words less extensive in their import than those in the former Writ ; and it is obvious, that the former, which more resembles an assignment than an ordinary Writ of execution, may have had, by reason of the apprehended danger of waste of inchoate demands which might result in debts, a wider effect than the Writ of actual execution.

The process now under consideration is one differing from both. It is similar to the seizure of effects in the hands of a Garnishee. The question is on what property that proceeding operates, and not what is the widest reach of any execution, including the appointment of a Receiver, which those Courts may issue.

The judgment under appeal refers to a late authority in support of it, which appears fully to bear out the position for which it was cited, viz., that the sums attached must be not inchoate, but existing and definite. No case was quoted in opposition to it.

The 205th section uses the word " property, " not claim or right. A mere right of suit is not property, but a title to recover future property.

A debt or property, which is seizable, or may be attached, does not lose those qualities merely by being the subject of a pending suit. The Judicial Commissioner refers to a passage relating to unproved assets which proceeded from a Directory Order of the late *Sudder Dewanny Adawlut*.

It is certainly said in Mr. *Macpherson's* Work before

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referred to, that unproved assets may be seized by attachment ; but it is also said, in a passage where he is plainly referring to the said Order in the same work, that mere rights of suit cannot be attached. These two apparently, but not really, conflicting positions, may be reconciled by reading the direction as applying to liquidated demands in their nature definite and certain, though *sub lite* and unproved. Various passages from Mr. *Macpherson's* Work on Civil Procedure hereinafter referred to, show that future property cannot be attached. It appears plainly from these passages that a mere expectancy, or a mere right of suit, cannot be attached, that the attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result. Thus, if the land of A. be held by A. subject to an option in B. to take it at a definite price or sum, the attachment must be of the land and not of the price. An existing debt, though payable at a future day, may be attached, whilst a salary, wages, or money claim accruing due, may not : and it is added, that if a Creditor desires to have a security on the receipts of a salary as they accrue, that can be effected only by contract with the Debtor and arrangement with him, and not by an attachment by the act of the Court ; see pp. 432-434 [3rd Ed. ]. Mr. *Leith* referred in his argument to the family property of Hindoos, and urged that such a share in such property may be attached and sold in execution. No doubt can be entertained that such a share is property and that a Decree-holder can reach it. It is specific, existing, and definite ; but it is not properly the subject of seizure under this particular process, but rather by process direct against the Owner of it,



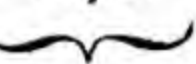
whether by seizure or sequestration, or appointment of a Receiver.

In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future Award, as to which it is wholly uncertain, until the Award be made, to what the Debtor will be entitled. The uncertainty at the time of the attachment and sale was not limited to a mere question of *quantum*; It was wholly uncertain, as Sir *George Couper* has correctly explained in his judgment, in what the arbitration might terminate.

Their Lordships think, that this very case affords a clear proof of the wisdom of that construction which the judgment under appeal has put upon the words of this Act. The Courts have power to secure at once the rights of Creditors and those of Debtors by a judicious application of the powers of the Act; but their Lordships feel that it would be a cruel wrong and injustice if under colour of an execution, a thing described as a "claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to Arbitrators" could be put up to judicial sale: a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeaning a description as if it had been "all the claims of *Ram-nath* against all his Debtors." It is obvious, moreover, what a door of fraud would be opened if pending a reference, the Award of the Arbitrators could be put up for sale.

Their Lordships throw no kind of doubt on the power of the Court by sequestration or direct seizure, notice to Debtors or otherwise, to sell or administer, in execution of a Decree-creditor's claim all that the

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former law allowed him. They do not find in the Act, which apparently regulates rather than extinguishes any prior right of a Creditor, any evidence of intention to exempt property from executions, but they agree in the observation of the Judge that the Code of Procedure is a new starting point, and must be construed on its own terms, and worked in the mode which it prescribes. Sections 236, 241, and 243 of the Code provide sufficiently what debts due to the judgment Debtor may be received and applied in satisfaction of the judgment debt without the sacrifice consequent on a judicial sale. And their Lordships are satisfied, that there is nothing in that Code to authorize such a sale as has been professed to be made in this case, and which would require for its justification words too plain to be mistaken and too inflexible to be controlled.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed.

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CHARLES SETON GUTHRIE and others... *Appellants* ;

AND

ABOOL MOZUFFER and others ... *Respondents*.\*

*On appeal from the High Court, at Fort William  
in Bengal.*

THE questions in this appeal, which arose out of an action of ejectment, were ; first, whether a Deed of sale by *Cazee Nusseero ollah*, the Plaintiff in the suit, and since deceased, was executed by him under duress so as to invalidate the Deed, and secondly, whether the Plaintiff was entitled to a decree for immediate possession of the lands in suit with mesne profits, and to oust the Defendant, *Henry Inglis*, now represented by the Appellants from certain lands said to be in excess of the quantities conveyed by the Deed.

° Present :—Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

ceived the consideration-money, but in his plaint he made no offer to account for the same. Held, reversing the decrees of the Courts in *India*, that upon the evidence, no case of duress had been made out,

Held, further, that *A.* could only be entitled to relief in a suit properly framed, upon terms of accounting for the consideration-money and interest, as *A.*, if he had been coerced and subjected to such duress as destroyed his free agency, could not, at the same time, avoid the contract and retain the consideration-money.

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by *A.* against  
*B.* to recover  
possession of  
lands con-  
veyed by a  
Deed of sale  
by *A.* to *B.*

The plaint,  
filed six years  
after the date  
of the trans-  
action al-  
leged that *A.*  
had by duress  
and coercion  
by *B.* been in-  
duced to exe-  
cute the Deed.  
*A.* had re-



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The facts of the case and the arguments so fully appear in their Lordships' judgment, that no further statement is here necessary.

The appeal was heard *ex parte*, in consequence of the Respondents not putting in an appearance, and was argued by

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.

At the conclusion of the argument the further consideration of the case was adjourned.

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Judgment was now pronounced by

The Right Hon. Sir JAMES COLVILE :—

This appeal is against two decrees which have been made in a suit instituted in *December*, 1862, by one *Cazee Nusseeroollah*, to recover possession of certain lands with mesne profits, and to set aside a Deed of sale purporting to have been executed by him on the 11th of *October*, 1855, to one *Inglis*, in consideration of Rs. 4,000.

The suit was brought against the Widow and representative of *Inglis*, who died about the beginning of the year 1861. The Judge (Mr. *M. Shaw*) of *Zillah Sylhet* made a decree in favour of the Plaintiff on the 13th of *December*, 1862, and his decree was affirmed by the Chief Justice of the High Court of *Calcutta*, Sir *Barnes Peacock*, and *Shumboo Nath Pundit*, one of the Puisne Judges, on the 30th of *November*, 1863. Both the Plaintiff and the Defendant have since died, and they are represented



—the former by the Respondents, the latter by the Appellants on the record.

The issues settled in the cause are thus stated :—

First, did the Plaintiff voluntarily and on receipt of the sum set forth in the *Kaballah*, referred to in the plaint, execute to Mr. *Inglis* the Deed in question, or was the same forcibly taken from him by the latter ?

Second, in the event of the *Kaballah* being proved to be *bonâ fide* executed for value received, in that case, is the Defendant in possession of only the *Talooks* therein specified, or has she in addition taken possession of other *Seegga* lands in addition to that appertaining to the *Talooks* ?

It appears, therefore, that besides the principal question as to the validity of the conveyance impeached, there was a subsidiary question as to the extent and description of the lands held by the Defendant under colour of it.

It will be convenient, in the first instance, shortly to consider what, in *September*, 1855, was the position of the parties to the transaction, and their relation to each other.

The *Cazee* was a native landholder, and also a Mahomedan holding an office in the Court of the Judge of *Sylhet*. He had acquired this property in 1844. Mr. *Inglis* was a European, resident at *Cherra-Poonjee*, and engaged in various mercantile speculations, some of which, it may be presumed, rendered the possession of this particular land desirable to him. He had been in possession of it under a *Peishgee* lease granted to him by the *Cazee*, which in terms expired in *August*, 1855 ; but he contended that, by virtue of an instrument subse-

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quently executed by the *Cazee* for securing a further advance of Rs. 200, he was entitled to retain possession until the whole of what was due to him had been paid off. The *Cazee*, on the other hand, treating the interest of Mr. *Inglis* as determined, had on the 16th of *August*, 1855, granted a lease of the lands for four years to one Mr. *Sweetland*, as Agent for *Moran & Co.*, a European firm, which seems to have been rivals in trade of Mr. *Inglis*. The result was probably a state of things not infrequent in *India*—viz., that in which two European speculators are striving in competition with each other to obtain land from a native proprietor, and the native is playing fast and loose with both of them. On the 10th of *Assin*, 1262, B.S., corresponding with the 24th *September*, 1855, Mr. *Inglis's* Agent presented a petition in the Magistrates' Court, stating his principal's title to the land, and the lease to *Sweetland*, and praying for the intervention of the Magistrate on the ground of an apprehended affray. And, on the preceding day, the *Cazee* filed a petition in the Judge's Court, stating the loss of his Boat containing his official and private seals, his Register Book, and other property; and insinuating that they had been abstracted and concealed by the contrivance and machinations of the *Amlah* of *Inglis*, resident at a place called *Chattuck*. This petition did not conclude with any prayer for relief, but ends with this statement:—"I, by way of precaution, submit this petition reporting the matter as stated, and am engaged in search of the property, I will submit a detailed account of whatever may come to light hereafter." So stood things immediately before the execution of the Deed of sale. In speaking of what next occurred



it will be convenient, when a date is mentioned, to use the Hindoo month *Assin*, which covers the whole of the transactions.

The Deed of sale was executed on the 26th of *Assin* at *Chattuck*, in the House of one *Brijomohun*, the *Dewan* or native Manager of Mr. *Inglis* at that place.

On the following day, the 27th of *Assin*, the *Cazee* filed a petition in the Magistrates' Court, which contained the following statement of the circumstances under which, as he alleged, the Deed had been extorted from him.

That on the 3rd of *Assin* he left *Sylhet* in a Boat, taking with him his official and private seals, his Registry Book, two gold mohurs, &c. On the way he received information of the loss of an Elephant from his *zemindary* at *Pharrar Poonjee*, and, in order to seek for and trace out the Elephant, he went to that place, which he reached on the 6th of *Assin*. He met there one *Dhuneeram Doss*, an Agent of Mr. *Inglis*, who, after welcoming him with news of the recovery of the Elephant, took him to his lodgings and gave him Betel and Tobacco. On his return to the *Ghaut* he found his Boat and property gone. On this *Dhuneeram Doss* took him back to his lodgings, and promised to find the Boat, but returned in the evening with 40 or 50 armed *Khasheas*, who ultimately were reinforced by 400 or 500 clubmen. His companions were arrested, imprisoned, beaten, and oppressed. He himself was told that Mr. *Inglis* was very angry with him for having granted the lease to Mr. *Sweetland*, and that there was no chance of his saving his life unless he would sell the property to Mr. *Inglis*. On the next day *Dhuneeram Doss* again

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visited him, and told him that, unless he agreed to sell the property, he would not get back his Boat and property, nor would he be able to save his honour. Under this pressure he promised that after his return home he would "in some way or another get back the lease to *Sweetland* and sell to Mr. *Harry*." He then returned home in another Boat, and presented his petition of the 9th *Assin* in the Judge's Court. Some days afterwards he again left *Sylhet* in the company of *Biddyanund Rai*, the *Mookhter* of *Inglis*, went to *Chattuck*, where he fell into the hands of *Dhuneeram Doss* and *Brojomohun Dewanjee* and others, who told him that unless he would sell the *mehal* to Mr. *Harry* and receive back his property he would not be able to recover the latter or return home without risking his life and honour. They kept him under restraint for four or five days, and, finally, on the 26th of *Assin*, compelled him to put his signature to the Deed of sale, on which they had already put the impression of his private seal. They then returned his property, with some slight exceptions, and released him from confinement. After detailing all these outrages, the petition prayed the Magistrate to cause a local investigation to be held; to have the Houses of the parties implicated searched for the property said to be missing; to call for and consider the forged Deed of sale which they had thus forcibly got signed, and to issue an Order suspending its registration. The Magistrate, on the 19th of *October*, 1855, made an order for a local investigation by the *Darogahs* therein named.

In the other proceedings which followed on the execution of the Deed there seems to have been some delay, which is probably to be accounted for by the



fact, that at that season all the offices were closed for the *Doorga Pooja* holidays.

On the 14th of *November*, 1855, the Deed was registered on the appearance of *Biddyanund Rai*, describing himself as the *Mookhter* of the party executing and on the usual evidence of execution. By a petition presented on the following day the *Cazee* protested against the registration.

On the 18th of *December*, 1855, the Magistrate, pronouncing it to be one of the grossest cases that had ever come before him, dismissed the *Cazee's* complaint, and by another and substantive proceeding fined him Rs. 200 for having brought a false charge. The first of these Orders was affirmed; the latter was reversed on appeal by the *Zillah* Judge on the 23rd of *January*, 1856.

That the *Cazee* should, after this, have delayed to bring the present suit for nearly six years, is a circumstance which, if unaccounted for, would raise a strong inference against the truth of his case. But this delay is in some measure explained by the intermediate litigation which took place touching the lease to Mr. *Sweetland*, and which lasted until *May*, 1861. In the course of that litigation to which the *Cazee*, seeking to get the benefit of an alleged *Ikrah*, in which *Inglis* and the persons claiming under *Sweetland* were parties, the validity of the Deed of sale of the 11th of *October*, 1855, came incidentally in question, and was affirmed by the decree of the Principal *Sudder Ameen* of the 14th of *May*, 1861.

Their Lordships now proceed to consider the case made by the *Cazee* in the present suit, and the evidence by which it is supported. He has discarded the whole story of the violence to which, as he alleged

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before the Magistrate, he was subjected on the 6th and 7th of *Assin*. It was, indeed, incredible that one on whom such outrages had been perpetrated should return a few days afterwards to perform the promise which had been extorted from, and place himself again in the power of those who had maltreated him. Moreover, the fact that personal violence was offered to him on that occasion was inconsistent with the statements in his petition of the 9th of *Assin*. He does not, however, recommend himself to credit by throwing over the more improbable portions of a story which had been judicially declared to be false, in order to make the rest more plausible. His case in this suit is, that the adherents of *Inglis* led astray the Elephant; that having thereby brought him to *Pharrar Poonjee*, they (about the 6th of *Assin*) concealed his Boat and the property therein; that afterwards, and in order to get his chattels returned, he was induced to go to *Chattuck*, where, on the 26th of *Assin*, the creatures of *Inglis* shut him up, and fraudulently having got a Deed of sale drawn up in respect of the *Talooks*, desired him to sign it; that although he had refused to do so, yet being well aware that there was no chance of saving his life and reputation unless he attached his signature thereto, he signed and left it, and, proceeding to the Criminal Court, lodged a complaint, which had been dismissed. The gist of his case, therefore, is still duress not only of goods but of person,—personal restraint, and danger to his life and reputation. And, accordingly, the latter part of the first of the settled issues was as above stated, was the Deed forcibly taken from him by Mr. *Inglis*?

The decrees under appeal must be taken to find this issue in favour of the Plaintiff; and either to



rule that in consequence of the violence done to him he was entitled to treat the Deed as a nullity and to recover the lands without returning the consideration-money, or to negative the fact that the alleged consideration of Rs. 4,000, was paid to him. They do not, in terms, find whether he did, or did not, receive that sum.

That the money was in fact paid by *Inglis's* people, and received by the *Cazee*, their Lordships on the evidence have no doubt. The payment is sworn to by the Defendant's Witnesses, and they are confirmed by at least three of the Plaintiff's Witnesses, viz., *Gazee Buksh*, *Gholam Hossein*, and *Kumuruddee*, who all admit that the money reached the *Cazee's* Boat. In his earlier deposition before the Magistrate, *Gholam Hossein* admits this fact even more explicitly and also his own participation in counting the money. Nor does the *Cazee* anywhere expressly deny that he received the money. From the Magistrate's Order it appears, that on the investigation of his complaint he did not dispute, if indeed he did not compressly admit, the payment of the Rs. 4,000.

Again, their Lordships are of opinion, not only that the evidence in the cause falls very far short of proof that the *Cazee* was subjected to personal violence of the nature and degree stated in the plaint, but that it is insufficient to warrant the general conclusion that the Deed was forcibly taken from him. It appears from the testimony of the more credible Witnesses produced by him, viz., *Gholam Hossein* and *Kumuruddee*, that so far from being "shut up," he lived two days or more during which the negotiation was going on on board his Boat, which was lying off the *Ghaut* at *Chattuck*; that he passed freely from his

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Boat to and from the House of *Brijomohun* the *Dewan*; and that he was in communication with a *Jemadar* of police, who would doubtless have protected him had his liberty been threatened. These Witnesses further admit that on the first day of the negotiation, and before there was any show of personal violence, he agreed to grant to Mr. *Inglis* a permanent lease of the land, though he refused to grant a *putnee* one. The earlier deposition of *Gholam Mahomed*, which, as made *recente facto*, is far more trustworthy than the testimony given by him in his suit, contains an admission, that after two days' negotiations, and before going to the House of *Brijomohun* for the last time, on the 26th of *Assin*, the *Cazee* had agreed "to dispose of the *mehal* for the sum of Rs. 4,000." It further admits that he signed the Deed and handed it to *Kumuruddee* to be sealed. The only pressure to which this deposition, if taken to be true throughout, shows that the *Cazee* yielded, was the fear that unless he signed he would not get back his missing property. The statement, that though he had told the Witness that he would not have been able to save his reputation unless he affixed his signature is indeed thrown in at the end of the deposition. But no fact which renders that statement probable is proved. Against this testimony, the evidence of the Witnesses from the Bazaar is worthless. But even their testimony does not amount to proof of the allegations in the plaint. Their Lordships are, therefore, of opinion, that the Plaintiff in the suit altogether failed to establish the case alleged; and that the evidence in the suit was insufficient to warrant the decrees under appeal.

Their Lordships need hardly remark that, in



coming to this conclusion, they have not been insensible to the difficulty which they always feel in disturbing the concurrent judgments of two Indian Courts upon an issue of fact. They observe, however, that they have not here to deal with a consistent case deposed to by the Witnesses for the Plaintiff, and contradicted by the Witnesses for the Defendant, a case of which the determination depends on the credit to be given to the Witnesses on one side or the other. In this case their Lordships' conclusion is very much founded on the inconsistencies and imperfections of the Plaintiff's proofs. Moreover, the finding of the Courts below is inconsistent with the result of the investigation of the Magistrate, held immediately after the transaction, and with the finding of the Principal *Sudder Ameen*, already adverted to, in favour of the validity of the Deed. The judgment of the *Zillah* Judge contains several inferences which do not appear to their Lordships to have been warranted by the facts before him, and it treats the Order of the Magistrate dismissing the complaint of the *Cazee* as reversed, whereas it was confirmed, on appeal. The judgment of the High Court is a mere statement that the Judges of that Court saw no reason to differ from the finding of the *Zillah* Judge.

Their Lordships, however, regret to say, that they are by no means prepared to affirm, upon the evidence before them, that the conduct of *Inglis* and his Agents throughout these transactions was fair, honest, and straightforward. The Defendant allowed her defence to be conducted so as to leave her case open to grave suspicions. She has failed to explain what the negotiation really was which induced the *Cazee*, who a few days before was in a state of hostility, to make the

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sale. *Brijomohun*, *Dhuneeram*, and *Biddyanund*, *Mookhter*, were all subject to the gravest imputations, yet not one of them was called as a Witness to deny the charges against him. They are not shown to have been dead when the cause was tried; it is pretty clear that *Brijomohun* at least was then alive.

They had to meet not merely the charge of violence, but the imputation of having contrived, by means of the abstraction of the *Cazee's* goods, to trick him into coming to *Chattuck*, where he would be under their influence, and of having made the detention of his goods the means of pressure upon him. From the latter imputation they have certainly not relieved themselves. Nor has *Biddyanund* shown by what authority he represented himself to be the *Mookhter* of the *Cazee* when he procured the registration of the Deed. The non-delivery of the title-deeds, upon which stress was laid at the *Zillah* Court, seems to their Lordships to be a circumstance of no moment, since it is consistent with either view of the transaction; for those documents are not likely to have been with the *Cazee* at *Chattuck*; and his repudiation of the Deed followed immediately on its execution. Nor are their Lordships disposed to think, that the consideration for the purchase was at the date of the transaction inadequate. The lands, whatever be now their value, were then recently settled; and the *Peishgee* leases afford some criterion of their then annual value.

Let it, however, be assumed that *Inglis's Amlah* entered into the alleged plot to bring the *Cazee* to *Chattuck*; that they caused his goods to be abstracted and made the execution of the Deed of sale the condition of their restoration; and that, on his



side, he agreed to sell, and executed the conveyance in order to get back his goods, but with a mental reservation that he would take the earliest opportunity of impeaching the transaction. The testimony of his most trustworthy Witness scarcely carries the case beyond this. What, on such a case, would be his rights? The contract was complete, and he could only be relieved from it in a suit properly framed for that purpose upon proof of facts entitling him to that relief, and upon the terms of accounting for the Rs. 4,000, with interest. Whatever be the law applied to such a transaction, whether it be the law of *England*, which, in this case, was the law of the Defendant, or the Mahomedan law, which was the law of the Plaintiff, or the general rule of equity and good conscience, which was the law of the *Forum*, these consequences, would equally follow. The Plaintiff could not insist that he was subjected to such personal duress as destroyed his free agency, and entitled him to treat his Deed as a mere nullity. He could not both avoid the contract and retain the money. For the law of *England* it is sufficient to cite *Skeate v. Beale* (11 Ad. & El., p. 983), or *Sheppard's Touchstone*, ch. IV. p. 61. The Mahomedan law on the point is to be found in the 3rd volume of *The Hedaya* (by *Hamilton*), pp. 454-458. The *Cazee*, however, did not take this course. He sought to gain an advantage over his Opponents by making the transaction the groundwork of false charges which would bring them within the scope of the Criminal law. Whether he might have succeeded in establishing a case for such equitable relief as is above suggested, their Lordships are not in a position to say, since no such case has been alleged or proved before them. In

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this appeal they can only say, that he has failed to prove the case made, and that his suit ought to have been dismissed. To such a case the rule laid down in *Hickson v. Lombard* (Law Rep. 1, H. L., 324), clearly applies.

Their Lordships, therefore, will humbly advise Her Majesty, that this appeal should be allowed, that the decrees under appeal be reversed, and that, in lieu thereof, a decree be made dismissing the suit with costs in both of the Courts below. Their Lordships would, however, further recommend that this dismissal be without prejudice to any question as to the lands alleged not to have been comprised in the purchase-deed, or to the title of any person other than the *Cazee*, or those claiming as his representatives. They deem this reservation to be necessary inasmuch as the evidence as to any lands being held by Mrs. *Inglis* in excess of those conveyed by the Deed is altogether unsatisfactory; and a claim appears to have been advanced by certain members of the *Cazee's* family under a title alleged to be prior to that conveyed by the Deed, which was not tried, and could not have been tried between them and the Defendant.

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RAJENDRO NATH HOLDAR

*Appellant :*

AND

JOGENDRO NATH BANERJEE and } *Respondents.\**  
others*On appeal from the High Court of Judicature at  
Fort William, Bengal.*

IN this appeal, the suit was instituted in the Court of the Principal *Sudder Ameen* of the 24 *Pergunnahs* by the first Respondent *in formâ pauperis*, against the Appellant, and the other Respondents, as nominal parties, to recover a moiety of landed property situate at

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

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A Hindoo Testator by his Will gave authority to his Widow, with the consent of his Mother, to adopt a Son; in pursuance of which a Son was adopted, and

the other provisions of the Will acquiesced in by the family for twenty-seven years, when a suit was brought by one of the Testator's heirs claiming the estate then in possession of the adopted Son, on the ground that the adoption was invalid. Held (reversing the decree of the High Court at *Calcutta*), that although the Defendant was bound to prove his title as adopted Son, as a fact, yet from the long period during which he had been received as adopted Son, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party, who had a right to question the legitimacy, where the Defendant, in order to defend his *status*, is allowed to invoke against the Claimant every presumption which arises from long recognition of his legitimacy by members of his family; and that the case of a Hindoo, long recognized as an adopted Son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family.

On reversal by the Judicial Committee of the decree of the High Court, such costs, as were allowed by the practice of the Courts in *India* to a successful Plaintiff suing *in formâ pauperis*, and paid, were ordered to be restored to the Defendant.

As the heir-at-law in contesting the appointment of an adopted Son had a decree of the High Court in his favour, no costs of appeal were given on such reversal.



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*Kalighat*, which he claimed as heir of one *Kalli Prosad Holdar*, on the ground of his being one of *Kalli Prosad Holdar's* Sister's Sons. The Appellant, and such of the Respondents as contested the suit, denied his title, on the ground of *Kalli Prosad Holdar* having made a Will disposing of his property, which instrument also empowered his Widow, with the consent of the Testator's Mother, to adopt a Son, under which power it was insisted by the Appellant that he had been duly adopted by the Widow, with the Mother's consent.

The facts and points raised on the appeal are fully stated in their Lordships' judgment.

The case was argued by

Mr. *J. D. Bell* for the Appellant, and  
 Mr. *Doyne*, for the first Respondent.

Judgment was delivered by

The Right Hon. Sir JAMES COLVILE :—

This case had been extremely well argued on both sides ; but their Lordships having had time to examine the evidence, and having now weighed the arguments on both sides, have come to a clear conclusion, that this appeal ought to be allowed, and the grounds of that conclusion I am now instructed to state.

The question is one touching the right of succession to the estate of one *Kalli Prosad Holdar*, a Brahmin, who seems to have been possessed of a considerable estate, including certain spiritual rights and privileges connected with the worship of the Goddess *Kalee*, in the well-known Temple in the vicinity of *Calcutta*. *Kalli Prosad Holdar* died on the 16th *Assin* 1244. a day which corresponds with some day in *September*, 1837. He left a Widow, a



Mother, and four Sisters. The Mother pre-deceased the Widow, and died in 1855; the Widow died in *July*, 1864. Of the four Sisters, two are dead; one of them without issue, the other leaving a Daughter. And of the two surviving Sisters, one is childless, and the fourth only has male issue, namely, the Respondent, *Jogendro Nath Banerjee*, and the infant Respondent, *Kameeka Nath Banerjee*, and these two persons, if *Kalli Prosad Holdar* died intestate, are the persons who, according to Hindoo law, would be entitled to inherit the estate in succession to the Widow.

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Shortly after the Widow's death, in 1844, the Respondent, *Jogendro Nath Banerjee*, suing *in formā pauperis*, commenced this suit, in which he claims to recover an eight *annas* share of the estate from the Appellant, who claims under an adoption by the Widow, alleged to have been made by virtue of a testamentary disposition of her Husband, and from the other persons claiming interests in the estate under that testamentary disposition. The infant Brother is made a Defendant *pro formā* on the record, and is represented by his Father and Guardian, *Kasseeputtee Banerjee*.

The appeal, however, has been argued as if the litigation were confined to the adopted Son of the Widow, who is in possession, that is, the Appellant, and the Respondent, *Jogendro Nath Banerjee*; and in that point of view it will be convenient to consider it.

The issues are these,—“Whether or not the suit is barred by the Statute of Limitations? Whether or not the Will, the *Dan Unnoomottee puttro*, of the 6th *Assin*, 1244 B.S., alluded to in the written state-



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ment filed by the Defendant, *Rajendro Nath Holdar* was a genuine document? if so, whether the Defendant had been, according to the *Shastras*, adopted by *Matunginee Dabea*, Widow of *Kalli Prosad Holdar*, deceased?" The next, whether, in the event of the aforesaid Deed of gift being not proved, the Plaintiff is entitled, under the Hindoo law, to succeed to the estate or property included in the suit? and if so, whether he is entitled to possess the whole estate or not?

Of these issues, the second alone, and perhaps only part of the second, is material. The first issue, that upon the Statute of Limitations, was originally determined by the Principal *Sudder Ameen* (*Baboo Koonjoo Lall Bannerjee*), the Judge of the Court of First Instance, in favour of the Defendant. His decision was reversed on appeal, and it has been candidly and fairly admitted at the Bar by Mr. *Bell* that it is impossible to impeach that decision; that, according to the authorities in *India*, time would only begin to run against the first Respondent from the date of the Widow's death.


Again, the third issue, it may be assumed, would, if it were necessary to try it, be necessarily found in favour of the first Respondent, the Plaintiff in the suit, to the extent of the interest claimed by him in the estate, namely a moiety, or eight *annas*.

With respect to the second issue, it has been suggested by Mr. *Doyne* that it may admit of the contention on his part, that the adoption of the Appellant was invalid, because it was not made with the consent of the Testator's Mother, which the Will made a condition precedent to an adoption. But their Lordships, as they have already intimated, do not consider



that that point is in terms open upon the issue, the latter part of the issue being "whether the Defendant had been, according to the *Shastras*, adopted by *Matunginee Dabea*, Widow of *Kalli Prosad Holdar*, deceased." Those words really raise only the question, whether all the ceremonies, and whatever other requisites the Hindoo law has made essential to an adoption, had been complied with. Their Lordships would not have held the parties strictly bound to the terms of the issue, if they had seen any trace that it had been understood in any other sense in the Court below. But they cannot find that that was the case, that it ever was raised in the Court below that the Testator's Mother had not given her consent to that adoption; and they are confirmed in this by looking at the grounds of appeal which were filed by the first Respondent in the High Court in which he takes these two points with reference to the adoption: "The Lower Court has failed to consider that *Matunginee Dabea* had no right to adopt under the existing Hindoo law of adoption. There is no proof to show that the ceremonies and formalities prescribed by the Hindoo law were legally performed, and the Defendant's adoption ought to have been cancelled on that score." There is not a word suggesting that the Testator's Mother's consent had not been given. Under these circumstances, if the Mother's consent were necessary under the Will, as to which their Lordships give no opinion, it must be presumed that that consent was given.

That part of the issue which relates to the validity of the adoption according to the *Shastras* was found by the Court of First Instance in favour of the Appellant. The High Court has intimated no opinion, as it was not necessary for them to decide that point,

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whether the judgment in that respect was right or not; but their Lordships have heard no reason whatever, and no grounds have been shown before them at the Bar, for impugning that part of the decision of the Principal *Sudder Ameen*.

The sole question, therefore, on which the determination of this appeal depends, is the validity of the *Dan Unnoomotte puttro*, which it will be convenient, as it is in its nature testamentary, to call in the observations which I shall hereafter make, "the Will." This Will purports on the face of it to have been executed on the day of the Testator's death. The effect of it, so far as it is necessary to read the passage, is correctly stated in the judgment of the High Court. The Judges say, "This Deed" (as they call it), "it will be observed, gives his Wife, *Matunginee Dabea*, permission, with the consent of his Mother, *Jeomoney* to adopt one Son. It makes a present division of his property into seven *annas* and nine *annas*, but postpones the enjoyment of it by the parties for whom the several shares are intended, until the death of his Mother, who during her lifetime, is to be the proprietor and Manager of the whole sixteen *annas* of his property, and to pay his debts out of the nine *annas* share and other expenses of maintenance, etc. out of the sixteen *annas*. On the death of his Mother, his four Sisters are to take possession of their seven *annas* share, and in case of any one of them dying childless, her share is to descend to the children of the other Sisters. The nine *annas* share is to be the property, without power of alienation, of *Matunginee Debea* during her life, and after her death it is to descend to her adopted Son." I stop there because I am not clear that the Judges have really given the true



construction of the concluding clauses of the Will in what follows, and it is unnecessary to consider, whether that construction is right or not.

The earliest production of the document was within ten months of the Testator's death, in *August*, 1838. In that month *Jeomoney*, the Mother of the deceased, came forward as Executrix, as we should say, under this Will, claiming to be substituted as Decree-holder in a suit in which her Son had recovered a decree in his lifetime. The Widow appeared on that occasion by her *Mookhter* to support her Mother-in-law's application. The Judge seems to have required, or the parties to have tendered, proof of this instrument. The Writer of the instrument was examined, and one, if not two, of the attesting Witnesses were also examined. The evidence, such as it was, seems to have satisfied the Judge, at all events for the purposes of the application, that the document was to be treated as a true document, and, accordingly, the Mother was substituted as the Decree-holder.

So far, therefore, the Widow, who was the heiress-at-law of the alleged Testator, was supporting the alleged testacy. In 1844, however, there seems to have been some change in her disposition in that respect, and some disagreement in the family, and she then made the application to sue *in formâ pauperis*, in order to assert her rights as heiress-at-law. She appears from that document to have left her Husband's House at that time, and to be residing in her Father's House, where, of course, she would be under the influence of parties who would urge her to assert her extreme rights, and if they considered it necessary for her rights to do so, to dispute the Will. Whatever she may have actually done after that in the

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suit, does not appear, but it is clear, that in 1845 that litigation was compromised, and she reverted to her original position of a person supporting the Will and taking under it. The effect of the compromise was, that the Will was admitted as the foundation of the rights of the family, but the Mother retired from that position in which the Will placed her, of being *Mookhter* of the whole estate,—the person managing the estate with whatever beneficial interest that management might give her, and supporting the whole family out of the proceeds of the whole estate;—and that she thenceforward agreed to be entitled to receive maintenance only, and to put the Widow in the possession of that which the Will gave to her and the Sisters in immediate possession of that which the Will gave to them. Now, that compromise has been very much relied upon by Mr. *Doyne* as affording an argument against the validity of the Will. Their Lordships are unable to accede to the argument which he has laid before them. His contention is, that it must be presumed that the Mother would not have agreed to those terms unless she knew that the Will was a false document and was afraid of its validity being contested in open Court. But, on the other hand, it may equally be said that the Widow would not have agreed to relinquish her claim to the whole estate if she had known that the document could not be proved in open Court, and that she had every chance of gaining her suit. Without imputing such a motive to the Mother, it seems not wholly unnatural to suppose that she might be guided in that by the advice of members of the family,—that they might have put before her that the estate would very likely be wasted in litigation,—that the proof



of a Hindoo Will, when a true document, is always an uncertain thing, and that being advanced in years, and having her Daughters put in possession of seven *annas* of the property, her position would not be materially worse, and that she might fairly agree for the sake of peace to make the sacrifice which she did make. On the whole, their Lordships think, that it is impossible to draw any conclusion from that compromise which militates strongly against the evidence in favour of the Will.

From that time forth, with perhaps one exception, the family appear to have acted consistently upon the Will. This compromise was filed in the year 1845. The adoption was, I think, in 1848; but, intermediately, there are several proceedings both before and after the adoption in which all the family put forward this Will, claiming under the Will; and, in fact, there is nothing except the document to which I am now about to refer which shows that the Will was questioned by any of the immediate family of *Kalli Prosad Holdar*. That document is the one filed on the part of the Respondents. It is the petition of the Widow when a party, a relation of the family who had recovered a decree for costs against the Mother, was seeking, after the Mother's death, to get these costs from the Widow; and she, after stating that she had no connection with the Widow as heir, that the heirs of the Mother were her Daughters, no doubt does in the second paragraph of her petition speak of having been induced to consent to a division of the whole sixteen *annas* by collusion. But this document is filed in the Court by her *Mookhter*; it does not seem to have been signed by her, and their Lordships, considering that in this very document

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she describes herself as the Mother and Guardian of the Son adopted under the Will, cannot ascribe any importance to it, or suppose that this statement is anything but one of those statements which a native *Mookhter* is so apt to put in without much regard to the truth of what is alleged in it, in order to gain some immediate object in the suit in which it is filed. The adoption took place with great publicity and formality, was known to all the members of the family, and must be presumed to have been made under the Will.

We, therefore, find that for a period of twenty-seven years this Will was, with the exceptions I have mentioned, acted upon and recognized by the whole of the family of *Kalli Prosad Holdar*, and that the legal *status* of the Appellant was acquired under it with the knowledge of all the members of the family. If the document had been a fabrication, and if there were persons who might have intervened and have contested the Will, the presumptive heir, who was in existence before his title was defeated by the birth of the present contesting Respondent, might have come forward in one way or another and contested the Will. Therefore, there arises from all these circumstances a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favour of the Will. No doubt these circumstances as the law stands, are not conclusive against the first Respondent. He has the right to call upon the Appellant, the Defendant in the suit, to prove his title; but their Lordships cannot but feel that while he has that extreme right, every allowance that can be fairly made for the loss of evidence during this long period, by death or otherwise—every allowance which can



account for any imperfection in the evidence—ought to be made; and, on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the Will and to the acts done by them under the Will. The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned, a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the Defendant, in order to defend his *status*, should be allowed to invoke against the Claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindoo claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the *status* which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title.

With these observations, their Lordships proceed to consider the direct evidence as to the validity of this Will. They do not propose to go into it at any great detail. It was fully considered in the first instance by the Principal *Sudder Ameen*, himself a Brahmin, who has embodied his conclusions in a judgment, the careful preparation and expression of

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which seem to their Lordships to be highly creditable to that native Judge. He came to a clear conclusion, that the Witnesses who were called by the first Respondent to show that *Kalli Prosad Holdar* was in such a state of body that it was impossible that he could have executed this Will, were persons of no credit, and not to be believed. He, also weighing all the circumstances, giving weight to the probabilities of the case, and considering the positive testimony which had been adduced before him, came to a clear conclusion that the Will was genuine and ought to have been affirmed. Upon appeal to the High Court, the learned Judges of that Court, Messrs. *C. Travor* and *F. A. Glover*, for reasons which they have not recorded, but which may easily be presumed to have been a desire to examine the subscribing Witnesses for themselves, and also to examine the subscribing Witness who had not been called in the Court below, the Father of the Respondent, re-examined the three Witnesses who had been examined, and examined for the first time *Kasseeputtee Banerjee*. Of the evidence then taken, it may be said that the Witnesses who were re-examined do not appear to have been in any degree shaken, and the cross-examination of one of them, *Shiboram Chatterjee*, elicited some fuller account of the preparation of the Will, which is not altogether immaterial, if true, to the Appellant's case. Of the evidence of *Kasseeputtee Banerjee* it is sufficient to say that it amounted only to this, that though his name did appear upon the document, it had been added some twenty days after the death of the Testator at the instigation of the Mother, who told him that the arrangement was for the benefit of his future Son, and that her consent was necessary to any adoption. He does not



venture to express a conviction one way or the other as to the truth or falsehood of the Will, and it is obvious that his statement, taking it in the most favourable sense, that he merely put his signature at that time to a document of which he had not witnessed the execution, on that persuasion, does not entitle him to very much credit. If, on the other hand, he did it believing the document to be a forgery, he would, of course, be entitled to much less credit, and, therefore, his evidence is, not that upon which any reliance can be placed, and the Judges of the High Court do not appear to have grounded their judgment upon it. All they say as to the evidence of *Kasseeputtee Banerjee* is, "We think it better to form our opinion on the merits of this case irrespective of anything contained in it. Although, notwithstanding the equivocal position in which he stands on his own showing, we are inclined to think that there is some truth in what is stated as to the origin of the Deed now before the Court." That, therefore, may be left out of consideration.

Now, if the two judgments are looked at in opposition to each other, it would appear that the learned Judges of the High Court have, in the first place, differed somewhat from that Principal *Sudder Ameen* in his appreciation of the probability that such a document as this should have been executed. They say,—“As the Principal *Sudder Ameen* has remarked, it is contended by the Plaintiff that that Deed was a concoction of *Kalli Prosad Holdar's* Mother, *Jeomoney*, who fabricated it to provide for her Daughters, for whom a Hindoo Mother has greater affection than for male children, and that it was only to quiet the Wife that nine *annas* of the property

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was allotted to her : whereas by the Defendant it is urged, that *Kalli Prosad Holdar's* four Sisters were, according to the custom of the family, married to *Koolin* Brahmins, who never take their Wives to their home, or otherwise maintain them ; that mindful of their helpless situation and of his own salvation, he made a provision for the former at the same time that he provided for the maintenance of the latter ; and that as a dutiful Hindoo Son, he made the Mother Manager and proprietor ; that, moreover, *Kalli Prosad Holdar's* income was about Rs. 800 a year, and that one-quarter of seven *annas* of that sum viz. Rs. 85 *per annum*, was not an out-of-the-way sum of each of his Sisters. There is no doubt that this Deed is for the benefit of the Sisters of *Kalli Prosad Holdar*, and that it is only in case his adopted Son has issue that nine *annas* of the property can remain away from the Sisters or their heirs eventually. Without going so far as saying that there is an antecedent improbability in this distribution of the Testator's property, the Court has no hesitation in saying that that distribution is unusual. A permission is not given to the Wife to adopt more than one Son, and the adopted Son's patrimony is cut down, and it does not become vested in him until after his Mother's death, and if he dies issueless the property goes to the Testator's Sisters and their heirs. As to the necessity of *Kalli Prosad Holdar* providing for his Sisters married to *Koolins* by a Deed of that sort, that is not so apparent ; whilst they live in the family house the obligation would remain on *Kalli Prosad Holdar* and his heirs to maintain them and their children, but to divide his estate in this way is to go beyond the obligation which the Hindoo law imposed on *Kalli*



*Prosad Holdar.* Again, the Court does not see the justice of considering the adopted Son a stranger, and of contrasting him in the position of a stranger with that of the Testator's Sisters. After the adoption, the adopted Son is no longer a stranger; he is the person who procures the salvation of his adopting Father, and, therefore, in the face of so great a benefit accruing to the Testator from the Son adopted, any permanent diminution of the property left to him, even to the amount of four times Rs. 85, equal to Rs. 340 a year, bears the semblance of injustice."

On this it is to be observed, that the principal point upon which they differ from the *Sudder Ameen* is, the probability of the provision made for the Sisters, by giving them specific shares in the property, instead of giving them mere allowances for maintenance; and, it may be very true, as the learned Judges say, that these Sisters being married to *Koolin* Brahmins, there would remain the obligation on *Kalli Prosad Holdar*, or his successors, to maintain them. The whole question was, however, raised before the Principal *Sudder Ameen*, who, as a Brahmin, is at least as likely as the Judges of the High Court to know what a Brahmin would be likely to do in those circumstances, and he has expressed an opinion, that the provision was not an unnatural one for the Testator to make in those circumstances. Again, it is no doubt true that greater power is given to the Mother than she would have naturally under the Hindoo law, and that the interest of the adopted Son is postponed, and that the disposition is altogether different from that which might have been made by a man who had in his mind the single object of leaving an adopted Son.

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It is possible, and it has occurred to their Lordships, considering that as there is evidence which points to the provisions of the Will having been discussed a day or two before its actual execution, and to the relations subsisting between the members of this family, there may have been something like a compromise in the Testator's mind, namely, that there may have been some pressure upon him on the part of his Mother to make a larger provision for his Sisters: while on the other hand, that he was anxious to carry out the principle, dear to every Hindoo, of having an adopted Son, and that the actual disposition may have been the result of some such a compromise. But their Lordships have to observe, that they are not dealing here with a question, whether a disposition has been obtained by any undue influence or under any pressure, but upon the issue whether this document is a forgery or is the Will of the Testator.

Another point upon which the learned Judges of the High Court have intimated some dissent from the Principal *Sudder Ameen* was the credit to be given to two of the Witnesses examined, namely, the two young men. *Denonath Holdar* and *Koylas Chunder Banerjee*. The Court observes, "We do not believe the statement of *Denonath Holder* and *Koylas Chunder Banerjee* on this point. They were both Boys: no intelligible reason is given for their being at *Kalli Prosad Holdar's* House at such a time, and the evidence before us as to the duration of *Kalli Prosad Holdar's* sickness, as to his state two days before his death, and as to his state on the day of his death, even if it be credited, does not admit of our believing at the same time that he entered into those explanatory conversations with the Witnesses, which in their depositions



they detail." The observation that is founded upon the age of these two Witnesses might have some force if this document were now produced for the first time and their names were found upon it as subscribing Witnesses. But the argument is all the other way, when it is considered that the document was beyond all question produced in 1838; because it is in the highest degree improbable that, if persons were concocting a forgery, they would call into their councils two Boys sixteen or seventeen years old, who would be manifestly, from their youth, not likely persons to be entrusted with the secret. They have given an explanation which seemed plausible to their Principal *Sudder Ameen* and seems plausible to the Lordships, for their presence on that occasion. The explanation is, that a message came to the Father of one of them to go to the House, that he was prevented by business from going to the House, and he said to his Son, "Will you go?" The Son met a companion, also apparently a relation of the family, and they went together. There may be some little exaggeration as to the amount of explanation given, but their Lordships see no reason, as the Principal *Sudder Ameen* saw no reason, why their statement that the Testator did actually acknowledge before them that the document was his Will, should be discredited.

Therefore, going through the whole of these two judgments, it appears to their Lordships that really the *ratio decidendi*, or at least the turning-point in the minds of the learned Judges, was the impression which they derived from the inspection of the letter "M" (for *Munzoor*, or confirmed). Now, that point was not taken for the first time before the High Court. The suggestion seems also to have been made in the

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Court of the Principal *Sudder Ameen*, and he, as we understand his judgment, thought that there was nothing in it. Now, with great respect for the knowledge which the two learned Judges of the High Court possessed, as their Lordships doubt not, of the Bengalee language, their Lordships cannot but think that upon such a point as that, the native Judge, examining a letter in his own alphabet, is more likely to be a competent Judge than the two European Judges. But independently of that, it appears to their Lordships to be a very unsafe ground of decision. The evidence as to the absolute prostration and insensibility of the Testator at the time has been discredited. No doubt the Appellant's own Witnesses state, that he put this letter, feeling too weak to write his name at full. But it is impossible, from the mere inspection of the letter, as it appears to their Lordships, to be able to predicate with any degree of certainty or accuracy, that he was too weak to make the impression with his pen which he is said to have made." It is impossible to say what momentary rally of strength might take place to do an act of such brevity as that; and, therefore, their Lordships are unable to give to that, which is after all merely the impression of these two Judges derived from actual inspection, the weight which has been given to it. They cannot but think (considering that the evidence, supported as it is by the presumptions to which reference has been made), on the whole greatly preponderates in favour of the genuineness of this instrument; that the mere appearance to the eyes of those Judges of that letter is sufficient to outweigh it; and, therefore, their Lordships, however great their respect for the judgment of the High



Court, feel that it is their duty in the present case to advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and to direct that in lieu thereof an Order be made dismissing the appeal to the High Court. The party having sued *in formâ pauperis*, their Lordships will further recommend, that an Order be made dismissing the appeal to the High Court, with such costs, if any, as according to the practice of that Court are given to an Appellant suing *in formâ pauperis*, and the repayment of any costs that have been paid by the Appellant; and their Lordships, considering that they are dealing with an heir-at-law questioning this Will, and supporting a judgment which has really been in his favour, setting aside the Will, are not disposed to make any Order as to the costs of this appeal.

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*J. N. Das*  
Advocate High Court  
Jammu & Kashmir  
Srinagar.

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LALLA BUNSEEDHUR

... *Appellant* ;

AND

THE GOVERNMENT OF BENGAL

.. *Respondents*.\*

*On appeal from the Sudder Dewanny Adawlut at  
Agra, North-West Provinces.*

24th, 26th, &  
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THE facts of this case sufficiently appear from the judgment.

A Treasurer of a Collectorate was found, on going into his accounts, to have been a party with others in embezzling Government moneys in his Collectorate. His defalcations ran over several years. A surety Bond had been given for the Collectors' acts, and the Bond was renewed three times by the same surety during the period the Treasurer was in office, but the surety

The appeal was argued by Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant; and

Mr. *Forsyth* Q.C., Mr. *C. Pollock*, Q.C., and Mr. *H. C. Merivale*, for the Bengal Government.

Their Lordships' judgment was delivered by  
The Right Hon. the Lord Justice MELLISH.

This was an action brought on the part of the Government of *Bengal* against *Lalla Bunseedhur*,

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

never asked for the old Bonds to be delivered up when they were renewed. In an action by the Government against the Surety to recover the amount embezzled, held, that the renewal of the Bonds did not discharge the Surety from his liability under the first Bond, as the renewed Bonds were not in substitution of the first Bond.



who was a surety for *Sreekishen Chowby* the Treasurer of the *Mirzapore* Collectorate; and it was brought to recover a sum, with interest, of upwards of Rs. 60,000. The case on the part of the Government was, that between the years 1843 and 1848 the Treasurer had been a party to the embezzlement of the sums of money in question. Now, the first defence that was relied upon was a defence in point of law. It appears that the surety Bonds were three times renewed. The Treasurer occupied that position for a period of eight years. The Bonds were not renewed every year,—they were three times renewed, and in the other years the Government did not renew the Bonds, but they made an inquiry into the sufficiency of the security. The first point that was argued on the part of the Appellant was, that by the renewal of the Bonds, each Bond, as it was renewed, was in fact a novation, so that no action could any longer be maintained upon the old Bond, but it must be taken that by an examination of the accounts, the Government had satisfied themselves that no fraud or embezzlement had been committed up to that time; and that though they did not give up the old Bond, yet, practically, the new Bond was to be taken in lieu and satisfaction of the old Bond; so that the surety only became responsible for the deficiencies which might take place subsequently to the giving of the new Bond. If that defence was correct, the consequence would be that there would be a defence to all except any deficiencies which might be proved subsequently to the giving of the last Bond. Their Lordships are of opinion that that defence cannot be maintained. It rests entirely upon this, that we are to infer that each new Bond was given in substitution for the old

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one. The *Sudder* Court (consisting of Messrs. *M. R. Gubbins* and *E. M. Wylly*) say that, in their judgment, the new Bond was given probably under a misapprehension of what was the proper construction of the Orders of Government which require that, from time to time—in fact annually—there should be an examination into the sufficiency of the securities. They seem to have thought that made it necessary, or, at any rate, desirable, that new Bonds should be given; but, however that may be, the question simply is—are we to infer that it was intended to discharge the old Bond, if after the giving of the new Bond, a discovery was made, though unknown at the time, that frauds had been committed during the time, that the old Bond was in existence? If, indeed, the Government had known of the frauds, that would raise a totally different question, for then, of course, they ought to have warned the surety, and not allowed him to go on by giving a new Bond. But that is not contended. It is not suggested that until the year 1848, when the discovery was made by one of the parties in the office making a statement to the Government, the Government had any suspicion whatever that any frauds were going on. The old Bonds were never given up. The surety did not ask for the old Bonds. There is nothing to show that he had any idea that he was discharged, or that he had a right to the old Bonds, and their Lordships think that the explanation given by the *Sudder* Court is the correct one; but whether it is correct or not, there is nothing to show that the Government intended to give up or abandon any claim that they had upon any of the Bonds. Then it was argued that, at any rate, the Governmen



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having satisfied themselves, by their Collector, and by the examination which they made of the accounts, that no fraud had been committed, and that the accounts were correct, the new Bonds were given upon the faith of the accounts being correct, and that they are to be estopped from saying that the accounts were incorrect. There does not appear to their Lordships to be any ground for that argument. There must be such gross negligence as almost to amount to a participation in the fraud, before the fact of the Government examining into the accounts and not discovering the frauds sooner could operate as a discharge. The object of having securities is, that if secret embezzlements take place, the Government may have a security upon which they can rely.

Then with respect to the case itself. The mode in which the alleged frauds were committed is stated very clearly in the judgment of the *Zillah* Judge (Mr. *James Lean*). He puts it thus:—"The Government asserts, that the embezzlement occurred in this way, viz.,—the Treasurer received sums of money on account, revenue of villages, etc., which he did not pay into the Government Treasury, or enter into his *Hindee Siaha*; but, in connivance with the *Siaha Navees* and others, entered in the Persian *Siaha* as received by transfer, although there were no deposits on account of the said villages, etc., from which payments by transfer could be made, at the same time referring in the said *Siaha*, and also in the receipts he gave for the said sums to orders issued for payment by transfer from *bonâ fide* deposits relating to other villages, etc., which payments again were made up from moneys paid into the Government Treasury in advance on account of other villages, etc.,



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which will be adverted to below. *Lalla Bunseedhur*, in his answer, does not positively deny that the sum sued for has not been embezzled; but he insists that *Sreekishen Chowby* never received the items forming that sum, or they would be in his *Hindee Siaha*; and, moreover, *Irasals* have not been adduced to show that the sums were sent to him to take charge of; and that, in short, the Persian *Umlah* and *Tehseeldars* are the Embezzlers, and not *Sreekishen Chowby*. I consider that the statement of the Government proved as to the amount embezzled."

Now, that being the sort of charge that was made, it was strongly argued on the part of the Appellant, that it was proved only by inadmissible evidence; and indeed, it is on account of this allegation, that the charge was only supported by inadmissible evidence, that their Lordships have been induced to hear this case at such considerable length as they have done, because, if it had been simply an ordinary case in which it was a pure question of fact which both the Courts below had agreed on, it would have been governed by the ordinary rule, that unless it could be clearly shown that the Courts below had made some plain mistake, the judgment ought to be affirmed. Now, it is alleged that they made a plain mistake in this way. That there was a great deal of inadmissible evidence, to which both the Courts below gave weight—not only evidence which was inadmissible by the law of *England*, but evidence which ought not, in fairness and justice, to be allowed to have any weight.

That alleged improper evidence consisted principally of this: When the alleged frauds were in the first instance discovered, the first thing which was



done was that the Collector went down to examine into the matter, and to examine everybody who could give any information upon the subject, to find out what the truth of the matter really was, and he took a great number of depositions, and no doubt examined those persons from whom he thought he could get information privately, when neither *Sreekishen Chowby* nor *Lalla Bunseedhur* were present. Now, certainly, if any substantial reliance had been placed upon those depositions—if this case could not be proved independently of them, their Lordships would have been disposed to think it would certainly have been wrong to place any weight upon their evidence. If they were alive (and there is nothing to show that any of them, except *Sreekishen Chowby* himself, were dead), they ought to have been called at the trial; and to rely upon an *ex parte* deposition of a Witness who might have been called and cross-examined at the trial, would not be a practice that their Lordships would at all agree with, or think that any weight should be given to their depositions. But, as respects *Sreekishen Chowby* himself, he was frequently examined; first he was examined by the Collector, and subsequently he was examined by the Magistrate, and then afterwards he was tried and found guilty; and subsequently an action being brought (the details of which it is unnecessary to go into at present), he was examined again, and then alleged that he was innocent. Now, their Lordships do not consider that his evidence ought necessarily to be entirely rejected,—it probably would not be satisfactory to support a case upon an admission made by him alone, if the other evidence was not sufficient to amount to strong evidence against him; but if there is strong evidence against him, then probably

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the examinations (at any rate the examinations before the Collector) might be referred to for the purpose, at least, to see if he could give any satisfactory explanation of the charges which were made against him.

Then, as respects those depositions which their Lordships think inadmissible, they do not find, on carefully considering the judgments both of the *Zillah* Court and of the *Sudder* Court (certainly of the *Sudder* Court), and their Lordships are disposed to think of the *Zillah* Court also, that any reliance was placed upon them, and, therefore, they may be rejected. The real question is, therefore, first of all, taking the evidence which must be and everybody says is admissible how does the matter stand? There are three things to be made out: first, that there was an embezzlement; second that the sum embezzled amounted to the sum claimed; and third that *Sreekishen Chowby* the Treasurer, had a guilty knowledge of, and was a party to those embezzlements. Now, was there an embezzlement of the amount claimed? Upon that question there really was no serious dispute in the Courts below. It is charged plainly in the plaint,—the answer, does not in plain terms state that there was no embezzlement at all. On the contrary, in the very first answer, the substantial defence is, that if there was an embezzlement, *Sreekishen Chowby* was not a party to it. But it did not rest there. All the voluminous documents with which the Government supported their case, the Bill of discovery having been filed previously, were open to examination on the part of the Defendant.

Then Accountants were called, and they stated what the result of all the documents was; they stated



that they did show a deficiency in the accounts to the amount claimed,—that is the only possible way in which a fraud of that kind can be proved, because it is quite impossible for the Court itself to go into every single item of such voluminous accounts. In this Country it is the practice to call in an Accountant, who goes through the Books; he makes a summary of the accounts, and the other side are left to question them, and this case was conducted in that way. Now, the Appellant appointed persons who were perfectly competent for their duty, he being himself a large and extensive Banker, and they appear to have been Clerks of his own, who themselves went through these accounts, and after they went through them, they were asked, did they want any more documents,—was there anything that the Government could produce which they required? They said there was nothing more. They were examined. Their evidence has been read to their Lordships; and the result of that evidence is that an examination of all these documents tends to show that there was an embezzlement shown by these accounts to the amount stated. But the Appellant rests his defence upon this: he says these accounts do not make out that *Sreekishen Chowby*, the Treasurer, was a party to the embezzlement. The result come to, from an examination of the accounts, as he alleges, is, that they only show that the persons who kept the Persian accounts had been parties to the embezzlement, but that they do not show that the Treasurer had been a party to it.

The question, therefore, in their Lordships' opinion, is reduced to this: Is there satisfactory evidence that *Sreekishen Chowby*, the Treasurer, was a party to these embezzlements? and that also in a great measure

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resolves itself into this—is there satisfactory evidence that the sums in question were received in cash at the Treasury at all? for if they were received in cash, then, according to the ordinary course of business, they were handed over to the Treasurer himself; and inasmuch as the Persian Clerks never handled the money, it is impossible to see, if the money really was brought into the Treasury, how, by any manipulation of the accounts, the Persian Clerks, who had not got the money, could possibly carry out these frauds or embezzle the Government money without the knowledge and assistance of the Treasurer.

How then does the question stand as to the way in which the payments were made? The actual practice was this: the payments were either made in money or were made by transfer of deposits. When they were made in money from the village authorities, an authority to receive the money was procured to show that it was the intention of the person who had the money to pay in cash. He brought the money to the Treasurer. The practice was, that it was carried into the room where the Treasurer was, and it is stated by one Witness, that somebody else was always there with him, and there the money was paid over. There was a receipt given, and there is produced a form of the receipt for such cash payment, and that formed his receipt. Then it is the duty of the Treasurer to see that that amount of money is entered in the Hindee account. Then it is also taken to the Persian Clerks, and they have to enter receipt of the money in the Persian Books, and then the receipt has also to be taken to some other Clerk, who enters it in the *Dakhilla* account-book,



and then the receipt (whether before or afterwards does not clearly appear) is signed by the Treasurer, and that is given to the person who brought the money. Then it would appear, that he takes it back to the village authorities, and in some cases the village authority also puts his name upon the receipt.

Now, when the money is paid by a transfer of deposits, then it appears that these deposits either may be in the Treasury itself, having been previously paid in cash, or they may be in some other Treasury, as at *Benares*, where it may be more convenient to the landowner to make his payment. If that is the case, an order always has to be got from the Collector to authorize that transfer by way of deposit, and then that order appears to be brought to the office, and upon the authority of that order the transfer is made. Now, there are many of these cases. The Court below divided them into three lists, and for the present reference will only be made to the first class; that is, where the receipts were actually given. Now, in these cases, the forms of the receipts are set out in the record; and the first and the strongest evidence against the Treasurer is this: that the receipts are given in a form which, on the face of it, appears to be exclusively applicable to a payment in money; and looking at the form of the receipt, it is impossible to say that it does not, upon the face of it, purport to be a receipt for money. There is a number, and in the first column there is the name of the *Mehal*, and in the second column there is the name of the *Malguzar* on whose behalf the payment is made. Then there is the amount received, and the items in respect of which it is paid. Then there is the

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date upon which the money was deposited, which plainly means the date of the payment, which is the 30th of *March*, 1844, upon this receipt which is now before us. Then there is the name of the person through whom the money was deposited, which also plainly means the name of the person who brought the money to the Treasury and paid it in; and then there is the date upon which the receipt was given, which is the 30th of *March*, 1844, being the same date as that upon which the amount was paid. This is written out in Persian, and purports to be an acknowledgment of the receipt of cash. It is signed at the bottom by the Treasurer himself, with a memorandum "Rs. 743. Received by transfer by a *Parwannah*, No. 2669," in the particular one to which we are referring.

There is perhaps some little difficulty, or, at least, their Lordships had some difficulty in the course of the argument, in discovering exactly what was the mode of giving a receipt when the payment really was made by a transfer. Although there is perhaps no direct evidence of what the form of it was when the payment was made into the Treasury by deposit, whether it was the Treasury at *Mirzapore* or the Treasury at *Benares*, no doubt some receipt, acknowledging that payment, must have been given. Several of the Witnesses who were examined upon the part of the Government stated, that no receipt at all was given when a deposit was transferred, at the time when the transfer was made. In the judgment of the *Sudder* Court, which appears to have been taken principally from the allegations in the plaint, which are not certainly specifically, if at all, denied by the answers, it is stated that at some time or other,



whether the practice was first introduced by this particular Treasurer, or whether it was introduced before, is not perfectly clear; but, at any rate, upon many occasions a receipt was given, but that alterations were made in the form of it, as one would suppose would be the case, as otherwise it would represent what was positively untrue; and that it would contain a reference in the body of it, not merely after the signature at the end, to show that it was merely a receipt for a transfer, and that no money was paid at all at the time when it was given. Therefore, the receipt forms the first evidence, and very strong evidence, against the Treasurer.

Then that is confirmed in a great variety of instances by evidence upon the part of the village authorities, the *Canoongoes*, who say that, as respects those villages, they have no deposit accounts,—that it was the ordinary practice to pay in cash. That, secondly, confirms the statement that the payment was in cash. Then there is no entry of a receipt in cash in the Hindee *Siaha*, which would make it clear, and which in fact is not seriously denied, that if it was paid in cash, beyond all question the Treasurer was a party to the embezzlement. Then in the Persian *Siaha* they are entered upon the day upon which the payment was made, and it is very important to observe, that they are entered as paid in cash. In examining the items it is quite plain, that in the body of the *Siaha* they are entered as paid in cash; but, of course, if they had been summed up in the abstract of the day's proceedings as having been paid in cash, then the amount of cash in the Persian *Siaha* would have differed from that in the Hindee *Siaha*, and then when the Collector came to examine

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the Books the fraud would have been discovered directly. Therefore, though they are stated in the body of the Persian *Siaha* as received in cash, yet in the summing up they are not summed up in the cash column, but they are summed up as a part of those sums which were received by transfer of deposit. We also find in these Persian *Siahas* that, day by day, not only is the ultimate balance signed by the Treasurer, but the pages are also signed. It is said, that he does not understand the Persian language; but there is no satisfactory evidence of this, and it is very improbable that the Persian Clerks should have dared to go on, day by day, making those false entries which the Treasurer could have discovered at any time.

Then, besides that, there was another Clerk, who kept a Book of receipts, called the *Dakhilla* account, in which nothing was entered except payments in cash, and in which we find these entries as being received in cash. Now, taking into consideration the evidence of the payments being received in cash, are we to believe that the Landowner, or his Agent, who brought the money, the village authorities, the Persian Clerks, the persons who kept the *Dakhilla* Books (of whose guilt there is no evidence whatever), were all combined to cheat the Treasurer, and that they should succeed during this long period of years in cheating the Treasurer, though at the very time they cheated him they brought these documents, day by day, to him for his signature, thus giving him an opportunity of detecting them?

Moreover, if one looks at the accounts kept at the time, it will be seen that there is no reference in them to the deposit accounts from which the sums



embezzled were fraudulently pretended to be taken. There is no reference to them in the Hindee *Siaha*, or the Persian *Siaha*, or in the *Dakhilla* Book. The only place in which you find any reference to them is in the receipts themselves in the handwriting of the Treasurer himself. There you find a reference to the alleged transfer, and that is not denied. It is admitted by the Accountants of the Defendant, that in reality these transfers were all false and fictitious, because in reality they were not transfers from the accounts of the Landowner who made the payments, but were in reality transfers from totally different accounts which had nothing to do with these particular receipts; but being afterwards, as it appears, made up in some other way, which it is not necessary to inquire into, the Courts below agreed in the belief that the money was really received in those cases, and their Lordships certainly do not see any ground at all for differing from that opinion.

This morning Mr. *Forsyth* has taken us through two selected instances, and we have examined and traced these two cases all through, so as to enable us to see what was the effect of the entries; and that which has been stated has been proved in these cases. We have not thought it necessary to go beyond that, nor is it necessary to consider in detail, whether there is sufficient evidence in those cases in which the entries are not produced, but only the copies of the receipts. Their Lordships must consider them as copies of the receipts, nor is it necessary to go into the detail of those cases where no receipts at all are produced, because it is quite clear that the whole of the frauds are upon one system from beginning to end; and when it is once shown and proved that

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there were frauds to this amount, and how they were concocted and carried out, and when it is further shown clearly from certain instances, that there is evidence, beyond all question, that the Treasurer was a party to them, the inference is very strong indeed that he was a party to all the frauds. It never could be believed that some of the frauds were committed with the knowledge of the Treasurer, he receiving the money, and that the rest of the frauds were not practically committed in the same way.

Upon these grounds, therefore, their Lordships have come to the conclusion, that the judgment of the Court below was right, and that it was fully supported by the evidence, and hence they will recommend to Her Majesty that this appeal should be dismissed with costs.

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ANUNDO MOYEE DOSSEE, and others *Appellants* ;

AND

DHONENDRO CHUNDER MOOKERJEE, } *Respondents.\**  
and others ... .. }

*On appeal from the High Court of Judicature at  
Fort William in Bengal.*

THIS was an ejectment suit brought by the Appellants, the Executrix and Executors of *Mutty Lal Seal*, deceased, for recovery of a 4 *annas* and 16 *gundahs*' share in *Pergunnah Brahmon Bhoomee*, in *Zillah Midnapore*. The Appellants founded their claim on a mortgage, dated the 14th of *October*, 1841, alleged to have been executed by *Sree Nath Mullick*, also deceased, to *Mutty Lal Seal* and another.

The plaint filed in 1861 stated, that *Mutty Lal Seal* had purchased in a foreclosure suit brought against the representatives of *Sree Nath Mullick* at a sale under a decree made in *November*, 1852, with the sanction of the Master of the late Supreme Court at *Calcutta*, the above and other property, alleged to have been mortgaged to *Mutty Lal Seal* ; and it was further stated, that *Mutty Lal Seal* had been put into possession of some of the property, but that the Defendants had not, on

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor :—The Right Hon. Sir Lawrence Peel.

and foreclosure sale made thereon, the *Ben. Regs. of Limitation*, III. of 1793, sect. 14 ; II. of 1805, sect. 3, cls. 2 and 3 ; and Act. No. XIV. of 1859, sect. 1, cl. 12, apply, and are a bar to a suit against such Purchaser for possession, by parties claiming under the decree sale made in the foreclosure suit.

A foreclosure decree only affects the interests of the parties to the suit.

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The title of a judgment Creditor, or a Purchaser under a decree sale, is not on the same footing with respect to the law of limitation of suits, as that of a Mortgagor, or one claiming under an alienation from the Mortgagor.

If a Purchaser under a decree sale has been in undisturbed possession for more than twelve years, without notice of a prior subsisting mortgage,



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various pretences given possession of the remainder ; and that as 1 *anna* and 12 *gundahs* of the 4 *annas* and 16 *gundahs* of *Brahmon Bhoomee* had been sold for Government revenue, the Plaintiffs sued for the residue.

A written statement was put in on behalf of the Defendants, *Mohesh Chunder Mookerjee*, *Sreeman Chunder Mookerjee*, *Sreemutty Dukheena Kally Debee*, *Mutty Lal Mookerjee*, and *Beharee Lal Mookerjee* ; in which they, amongst other things, submitted, that the 1 *anna* and 12 *gundahs*, share of *Gokool Nath Mullick*, was purchased at auction on the 27th of *April*, 1843. and the share of *Sree Nath Mullick*, viz., 1 *anna* and 12 *gundahs*, on the 26th of *May*, 1846, in the execution of a decree, and were since held by them ; that twelve years since those dates had elapsed ; and that the Plaintiffs could not prefer any objection to the possession of the Defendants, they having held the same in undisputed possession for more than twelve years before the institution of the plaint ; and that the Plaintiffs' claim on such ground ought to be dismissed. They further submitted, that the proceedings in the late Supreme Court could not be used in any way as interfering with or lessening their rights, inasmuch as they were not parties to the suit for foreclosure. That at the date of *Mutty Lal Seal's* mortgage Bond, the 3 *annas* and 4 *gundahs'* share held by them, had been attached, and were afterwards sold in execution of the decree suit ; and that *Sree Nath Mullick* had not the power of mortgaging such attached property, and that such alleged mortgage was, if made, invalid. That *Sree Nath Mullick* was not the proprietor of more than 1 *anna* and 12 *gundahs* of the *Zemindary*, and *Gokool Nath Mullick* owned 1 *anna* 12 *gundahs* out of 3 *annas* and 4 *gundahs*, held by the Defendants, and that *Sree Nath Mullick* had no



power even to mortgage such property, and that any claim under such alleged mortgage was inadmissible. And it was further submitted, that *Mutty Lal Seal*, though cognisant of such sale under decree, did not make known to the Purchasers the existence of such mortgage, but concealed that fact. And lastly, that the Defendants claimed under a *bond fide* title, and were in possession under it; and that the Plaintiffs had instituted the suit after a long delay, and, therefore, had no right to maintain the same.

The other Defendants, *Dhonendro Chunder Mookerjee*, *Jadubindro Mookerjee*, and *Ghonesham Mookerjee*, as Executors of the late *Juggut Chunder Mookerjee*, also appeared, and put in their written statements, setting up the same objections as were made by the first-named Defendants.

The Plaintiffs in their written statement, in reply, stated amongst other things, that the mortgage relied on by them was made on the 14th of *October*, 1841, to their Testator; that the Defendants in their statement showed that under the sale in execution of decree they had purchased 3 *annas* and 4 *gundahs*' share out of the mortgaged properties; and that such sale took place subsequent to the date of the mortgage and the rights of the Defendants under the sale by the Supreme Court were destroyed. And they submitted, that as the Defendants only purchased the right of *Sree Nath Mullick*, their possession could not be held valid against the Plaintiffs, as the right of *Sree Nath Mullick* have terminated; and that the Defendants, therefore, could not avail themselves of the objection respecting limitation. And they further replied, that *Sree Nath Mullick* having acquired his own share of 1 *anna* 12 *gundahs*, and also the 1 *anna* 12 *gundahs*' share of *Gokool Nath*

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*Mullick*, agreeably to the agreement, and other shares under a Will, had mortgaged the same to the Plaintiffs' Testator.

The principal points in dispute between the parties raised in the Courts in *India* and on appeal, were, first, whether the suit was barred the Regulations of Limitation, the Defendants submitting that a 1 *anna* 12 *gundas* share of the property belonging to one *Gokool Nath Mullick*, a deceased Brother of *Sree Nath Mullick*, had been purchased by them after *Gokool Nath Mullick's* death, on the 27th of *April*, 1843, and that another share of like amount, belonging to *Sree Nath Mullick*, had been purchased by them on the 26th of *May*, 1846, both purchases being, as alleged, made at sales held in execution of money decrees; secondly, whether the decree of the Supreme Court was binding, as affecting the two shares, or either of them, by reason of the Defendants, as such Purchasers, not having been made parties to the foreclosure suit in which that decree was made; thirdly, whether the mortgage had been in fact, executed; and, lastly, whether the Defendants could, after the decree of the Supreme Court establishing the mortgage, dispute the mortgage.

The evidence produced did not satisfactorily establish the alleged mortgage of the 14th of *October*, 1841.

By the decree of the *Zillah* Judge, Mr. *R. H. Russell*, dated the 18th of *July*, 1862, it was decided, amongst other things, that the suit was not barred by the Regulations of Limitation; that the Defendants, the Purchasers of the property which had been mortgaged, stood in the same position as the Mortgagor, and that long possession did not bar the Plaintiffs' claim; that the decree of the late Supreme Court, and the sale thereunder, must be



held to be good as against the Mortgagor and those who stood in his place; that such decree established the mortgage, and the non-payment of the consideration-money for the same, and the Court accordingly decreed for the Plaintiffs' claim.

On a review of judgment, the same Judge, by a decree, dated the 19th of *September*, 1862, held that though with respect to incumbrances subsequent to mortgage, the decree in the foreclosure suit would not bind subsequent incumbrancers prior to the filing of the Bill and not parties to the suit, yet that the decree did bind all Creditors by mortgage, or judgment, and Assignees of the equity of redemption, and he modified his former judgment, so far as to give the Plaintiffs a decree in respect of the share purchased at the second sale, subsequent to the filing of the Bill, and dismissed the suit as to the other share purchased previously.

On appeal, the High Court, the Justices *Norman* and *Jackson* presiding, by their final judgment, dated the 12th of *September*, 1864, decided that it was not proved to the satisfaction of the Court that the mortgage was a valid and subsisting security, or even in existence at all at the date of the death of *Sree Nath Mullick*, or at the time of the sales of the property in suit to the Defendants. And the Court further held, that the Defendants, having brought the share in question subsequently to the filing of the Bill for foreclosure, were, as regarded that share, in the position of Purchasers *pendente lite*, and bound by the decree of the Supreme Court in the foreclosure suit; and, lastly, that the Plaintiffs' claim was barred by the Limitation Act, No. XIV. of 1859. The decree, thereupon, with reference to the last-mentioned share, reversed the decree of the *Zillah* Judge, and dismissed the suit.

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The appeal was from this decree.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellants.

First. We submit, that the High Court ought to have affirmed the last decree of the *Zillah* Judge, so far as it decided, that the decree in the foreclosure suit bound the Purchasers under the sale of the property which took place *pendente lite*. In *Wallace v. The Marquess of Donegal* (a), the effect of *lis pendens* on a Purchaser, for valuable consideration is considered; and *The Bishop of Winchester v. Paine* (b), is an authority that subsequent Mortgagees of the equity of redemption are bound by a decree of foreclosure, though not made parties to the suit. *Fisher* on the Law of Mortgage, p. 580 [2nd. Ed.]. The sale was made in a suit for foreclosure of a mortgage, and, as such suit was instituted prior to the sale under which the Defendants claim, they were bound by the decree in that suit in exactly the same manner as if they had been parties to the suit. The Court was wrong in opening the question of the mortgage transaction between *Sree Nath Mullick* and *Mutty Lal Seal*, which had been established and carried out by the decree of the Supreme Court and the subsequent sale thereunder to the latter. *Macpherson's* Law of Mortgage, p. 196 [5th Ed.]. The evidence of the due execution of the mortgage was sufficient.

Secondly; the Defendants bought at the execution sales in 1843 and 1846 only the right, title, and interest of the judgment Debtors in whom previously to the year 1841 the two shares purchased were then vested, but they had mortgaged the same, with the rest of the 4 *annas*, 16 *gundas*, as one entire estate, to *Mutty Lal Seal*, which mortgage was registered in 1842.

(a) 1 Dr. & Wal. 461, 457.

(b) 11 Ves. 194.



Lastly; the High Court wrongly decided, that the suit was barred by limitation under Act, No. XIV. of 1859, sect. 1. cl. 12, as the cause of action did not accrue to *Mutty Lal Seal*, from whom the Appellants derive title, until he became Purchaser of the property under the decree of the Supreme Court in the foreclosure suit, when he first became entitled to claim and enter upon possession of the estate.

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Sir *R. Beggallay*, Q.C., Mr. *J. Cochrane*, and Mr. *Pontifex*, for the Respondents.

There was no proof of the alleged mortgage of the 14th of *October*, 1841, relied on by the Appellants. [The Lord Justice *James* :—Their Lordships are of opinion, that there is not sufficient evidence of the mortgage, therefore, the foreclosure decree founded thereon as, affects third parties, is not sustainable.] Even if such a mortgage really existed, the present suit of the Appellants is barred by their not having proceeded for the recovery of the lands in the plaint mentioned within the twelve years' adverse possession when the cause of action arose, as prescribed by sect. 14 of *Ben. Regs.* III. of 1793, II. of 1805, sect. 3, cl. 2 and 3, and Act, No. XIV. of 1859, sect. 1, cl. 12. *Prannath Roy Chowdry v. Rookea Begum* (a), *Maharajah Koowur Baboo Nitrasur Singh v. Baboo Nund Loll Singh* (b); *Dabee Koomar Bose v. Roy Bykunt-nath Chowdree* (c); *Baboo Sheosuhye v. Baboo Brinead Singh* (d); *Punchanun Bose v. Roy Bykunt-nath Chowdree* (e).

(a) 7 Moore's Ind. App. Cases, 323.

(b) 8 Moore's Ind. App. Cases, 199.

(c) 16 S. D. Dec. 1853, 210.

(d) *Ibid*, 21.

(e) *Ibid*, 546.



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Secondly, *Mutty Lal Seal* having stood by and allowed the Respondents to purchase the property without having given notice of, or even alluded to the existence of his pretended mortgage, the Appellants cannot now be allowed to impugn their title as Purchasers.

Thirdly, the Appellants have no right to recover the property in suit, inasmuch as the several executed attachments gave a primary lien on the property itself as against execution of decree in respect to a third party, *Unnopoorina Dassea v. Gunga Narain Paul (a)*; *Gobindnath Sandyal v. Ram Coomar Ghose (b)*; Act, No. VIII. of 1859, sects. 240, 266.

Judgment was pronounced by

The Right Hon. the Lord Justice JAMES.

In this case their Lordships are of opinion, that the judgment and decree of the High Court in *India* must be affirmed.

The case has been argued at some length, and several important questions of law and of practice have been discussed before their Lordships. The suit itself, looking at the plaint scarcely seems to raise any of those questions. The suit is based entirely upon the title of a person who alleges that he purchased under a decree for sale, which decree was made on the 15th of *November*, 1852. The contention before their Lordships at first was, that that sale was made to a suit for foreclosure of a mortgage, and that that suit for foreclosure having been instituted prior to a sale under which the Defendants claimed, the Defendants are bound by that decree for sale in exactly the same manner as if they were parties to the foreclosure suit.

(a) 2 W. R. 296.

(b) 6 W. R. 21.



Their Lordships are of opinion, that there is no foundation whatever for the claim so put, that the case to which they have been referred to, *The Bishop of Winchester v. Paine* (a), has really no relation to a case of this kind. That case merely determines this,—that where there is a suit for foreclosure and the Mortgagor, a Defendant to that suit, makes a voluntary alienation, pending the suit, of any part of his interest in the equity of redemption, a Purchaser will not be allowed afterwards to institute a new suit for a new foreclosure, the ground being, that if that were permitted, proceedings in a foreclosure suit would be endless, because every day a fresh alienation might be made in some parts of the proceedings. But that was simply a foreclosure suit, and the subsequent Mortgagee would be barred from instituting any new suit in the Court of Chancery for the purpose of enforcing the equity of redemption. But no suit of foreclosure ever proceeded actively, or ever was made to work actively against a party who was not before the Court. That case simply decides that subsequent Mortgagees of an equity of redemption are bound by a foreclosure suit. This however, was not a foreclosure decree. It was a decree for sale, and a decree for sale made in the Supreme Court at *Calcutta* had no effect whatever *in rem*, as it had no effect whatever over the property in the *Mofussil*. The decree for sale was merely a decree, in substance, that the parties to the suit should concur in conveying and selling the property to a Purchaser, and no such decree for sale could have any operation whatever upon the title of persons in the *Mofussil* who were not parties to the suit. Therefore, it appears to their Lordships that the view of the case presented

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(a) 11 Ves. 194, 201.



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to them based upon the case of *The Bishop of Winchester v. Paine*, has really no application to the subject matter of this suit.

But the Courts below did go into the title anterior to the sale, and upon an investigation of that title the High Court came to a conclusion in favour of the Respondents. Their Lordships think it right, therefore, to some extent to go into the matters which were so discussed in the Courts below.

Now, one of the questions, and the most important question in their Lordships' judgment, conclusive with regard to the matter which was raised, was this: whether the title of the Defendants was anterior to the title of the Mortgagee and was anterior to his mortgage? Their Lordships are satisfied upon the evidence, that before the mortgage was made, which is the foundation of the Plaintiffs' title, whether it was made in *October*, 1841, or whether it came into existence some time between that and the date of the registration of the mortgage, which is the only thing before them, that is to say, the registration in *May*, 1842 (whichever date be taken), at the time when that Deed was executed, the property in question was actually attached under a decree of the Court, and under a sale in pursuance of that original decree, and of that execution, the title of the Defendants accrued; and their Lordships are of opinion, that the title of the Defendants, independently of the Regulations of Limitations, is paramount and superior to the title under the Mortgagee.

As a great deal of argument has been addressed to their Lordships upon that question in respect of the Regulations of Limitations, their Lordships think it right to add that, in their judgment, if the attachment under which the title of the Defendants was derived



had been posterior to the mortgage, still the Regulations of Limitations would have been a conclusive bar. Their Lordships think that the title of a judgment Creditor, or a purchaser under a judgment decree, cannot be put on the same footing as the title of a Mortgagor, or of a person claiming under a voluntary alienation from the Mortgagor. They are of opinion, that the possession of a Purchaser, under such circumstances, is really not the possession of a person holding in priority of the Mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the Mortgagee. The possession, which the Purchaser supposed he acquired, was a possession as Owner. He thought he was acquiring the absolute title to the property, and that he was in possession as absolute Owner. Their Lordships are assuming that no notice was proved of the existence of the mortgage title given to, or acquired by, the Purchaser; and there being no such notice, they are of opinion, that the possession of the Purchaser was the possession of a person claiming to be Owner. Under these circumstances they are of opinion, that if the title of the Mortgagee to enter by reason of a default having occurred before, had accrued, and if the Purchaser under such a title had been in possession for twelve years, believing himself to be *bonâ fide* Owner, under a claim to the ownership of the property, and not being in possession in any way as Mortgagor or under the Mortgagor, then in accordance with the cases, several of which have been cited to their Lordships, and probably were cited in *India*, according to the principle of those cases, which their Lordships adopt, they are of opinion, that the suit to disturb the possession of such

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a Purchaser ought to be brought within the twelve years after the commencement of his possession.

Their Lordships, on the whole, are of opinion, that the judgment of the Court below is correct, and they will humbly recommend Her Majesty that the appeal be dismissed with costs.

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KOOWAR ... } *Appellant,*

AND

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and others ... } *Respondents.\**

*On appeal from the Court of the Financial Commissioner of Oude.*

1st & 3rd  
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In *Oude*, before its annexation to the British rule, a *Rajah* was a *Talookdar* of a large *Talook*. A younger branch of his

family had a separate *Mehal* in the possession of *A.*, wholly distinct from and independent of the *Talook* the *Rajah* possessed as representing the elder branch of the family. The *Oude* Government for fiscal purposes, incoulded *A.*'s *Mehal* with the *Rajah*'s *Talook*, so that the *Rajah* as the elder branch of the family represented *A.*'s *Mehal* at the Court at *Lucknow*, notwithstanding that *A.* remained in undisturbed possession as absolute Owner, paying through the *Rajah* for his *Mehal* a proportion of the *jumma* fixed on the *Talook*. This relation between the *Rajah* and *A.* subsisted up to the time of the annexation of *Oude* by the British Government. While the Government was making a settlement with the Landowners, and *A.* was about to apply for a distinct settlement of his *Mehal*, he, and after him his Widow, was induced by the *Rajah* not to do so, the *Rajah* in Letters fully recognizing *A.*'s absolute right to the *Mehal*. After

IN this case the appeal was brought from a decree of the Financial Commissioner of *Oude*, which reversed the Orders of the Commissioner of *Fyzabad*,

Present:—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor:—The Right Hon. Sir Lawrence Peel.



and of the Deputy Commissioner of *Gondah*, and dismissed the Appellant's claim. The Orders and decree were made in a suit instituted by the Appellant to obtain a settlement with her, under the law then in force in *Oude*, of an estate called *Deotaha*, in the District of *Gondah*, and Province of *Oude*.

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There was no dispute as to the facts of the case, and the only question was as to the effect on the Appellant's previous admitted rights under a subsequent settlement of the lands in question which had been made with the *Talookdar*, a relative of the Appellant, and of certain orders of Government, relating generally to the land settlement of *Oude*.

The facts were these:—

The Appellant was the childless Widow and heiress of one *Kalee Pershad Singh*, who died in 1856, about the time of the annexation of *Oude* by the East India Company. *Kalee Pershad Singh* was the representative of the younger branch of his family, the representative of the elder branch being *Kissen Dutt Singh*, the *Rajah* of *Bhinga*.

The two branches had long been wholly separate in estate, *Kalee Pershad Singh* being possessed down to his death of the estate called *Deotaha*, and the *Rajah* of the *Talook* of *Bhinga*. The *Deotaha* estate

the suppression of the rebellion in *Oude*, and the Government had recognized the *Talokdary* tenure with its rights, a provisional settlement of the *Talook* including *A.*'s *Mehal*, was made with the *Rajah*; but before a *Sunnud* was granted to him, Government confiscated half his estate for concealment of Arms. The *Rajah* suppressed the fact of the trust relation of the *Mehal* of *A.*, and contrived that it should be included in the half part of the estate the Government had confiscated; which *Mehal* the Government as a reward granted to *Oude* loyalists. *A.*'s Widow brought a suit against the Government and the Grantees for the restoration of the *Mehal* and a settlement. The Financial Commissioner held that as the *Rajah* was the registered Owner of the *Mehal* of *A.*, included in his *Talook*, it had been properly forfeited. Such finding reversed on appeal, on the ground that *A.* was the acknowledged *cestui quē* trust of the *Rajah*, and that *A.*'s Widow, as equitable Owner, was not affected as between her and the Government by the act of confiscation of half the *Rajah's Talook*.



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had been originally acquired about the year 1798, after the separation of the two branches, by *Juggut Singh*, the Father-in-law of the Appellant, and had been held by him from the native Government of *Oude* under a separate and independent *Kabooleat* as *Talookdar* of the estate.

*Juggut Singh* died about the year 1831, leaving a widow and an adopted son, the before-named *Kalee Persad Singh*, who remained in the same independent possession of the estate untill about the year 1836, when, in consequence of the exactions and oppressions of the Officers of the king of *Oude* charged with the administration of the District, the younger branch for their own protection, arranged to hold their estates in nominal subordination to the elder branch and to have them included in the *kabooleat* under which the *Rajah* of *Bhinga* held his estates from the Government of *Oude*. Under this arrangement the revenue charged on *Deotaha* was paid to the State through the *Rajah* of *Bhinga*, instead of direct as before, but in all other respects the management and enjoyment of the estate of *Deotaha* remained with *Kalee Pershad Singh* as it had previously been.

By two Letters, dated the 7th of *February*, 1856, and the 14th of *January*, 1859, it appeared, that *Kalee Pershad Singh*, just before his death, probably in consequence of his being relieved, by the annexation which was then declared, from fear of future exaction, had contemplated applying for a direct settlement of his *Mehal*, and that the Appellant in 1859 had entertained the same intention, but they were dissuaded therefrom by the *Rajah* of *Bhinga*, who, in those Letters fully acknowledged their right so to do,



but suggested that, as they were both old, they would do better to leave the protection of their interests to him. The result was that the Appellant, after her Husband's death, did not apply for a direct settlement with her of the *Deotaha* estate, but allowed matters to continue as before. No *Sunnud* was granted to the *Rajah* of *Bhinga* or *kahooleat* taken from him embracing the *Deotaha* estate, but it appeared that a summary settlement was made with him in 1858-9, which included the *Deotaha* estate, but no disturbance of the Appellant's enjoyment of that estate took place.

On the 20th *June*, 1859, in consequence of the discovery of some concealed Guns in the premises of the *Rajah*, an Order was issued for the confiscation of one-half of his estates.

The *Rajah*, it appeared, was allowed to select the moiety which he would prefer to part with, and he accordingly pointed out for confiscation the entire *Mehal* of the Appellant, which was thereupon declared confiscated, together with 138 villages belonging to the *Rajah's* own estate, required with the *Deotaha* estate to make up the half of the lands included in the summary settlement with the *Rajah*.

Immediately on the Appellant learning the fraud practised on her, she, on the 29th of *August*, 1859, put in a petition of objection, on which an Order was recorded, that as the *Deotaha* estate had been given by Government to one *Shahrada Shaa Deo Singh*, no Order could be passed on the petition. An appeal from this Order of rejection met with no better success, but as in the meantime it appeared to have been decided not to give the *Deotaha* estate to the *Shahrada*, a different reason was given, namely, that though formerly the property of *Juggut Singh*, it had

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been for some years included in the *kabooleat* of *Kissen Dutt Singh*, whose estate had been confiscated.

After this, orders were first issued for settlement in Supercession of *Shahrada* with the *Mukhudums* (or haeds of the villages), and afterwards, notwithstanding the Appellant's petitions, by an Order, dated the 21st of *October*, 1859, forty-two out of forty-six of the Appellant's villages of the *Deotaha* estate were given away by the Government of *Oude* to loyal Grantees. Of the remaining four, three were at first settled with Appellant, but afterwards the settlement was cancelled, and the Appellant, without imputation on her loyalty, or inquiry as to her complaints, was stripped of the last fragment of her estate and reduced to entire poverty.

On the 10th of *October*, 1859, Orders were issued by the Governor-General confirming the settlement made with the *Talookdars*.

For some time after the confiscation, it appeared that the Appellant had not been allowed to take legal proceedings for the assertion of her right. On the 22nd of *November* 1864, the Deputy Commissioner, in pursuance of an Order of the Commissioner of the same date, called on the *Pergunnah Canoongoe*, for "a full report of the history of the *Deotaha* estate," and, on the 25th of *January* following he embodied the report so obtained in a memorandum, which he forwarded to the Commissioner of *Fyzabad*. Mr. *Simpson*, the then Commissioner of *Fyzabad*, sent it on to the Financial Commissioner, with an expression of opinion that as the *Deotaha* estate had been included in the settlement of the *Rajah* of *Bhinga*, the Appellant's claim was barred. After inquiries by the Government, the Appellant



obtained permission to sue, and accordingly, on the 21st of *July*, 1865, filed a plaint in the Court of the Financial Commissioner of *Oude* against the Government and the Grantees to obtain a settlement of the estate of *Deotaha*.

The Deputy Commissioner, Mr. *J. S. Ross*, having taken evidence as to the Plaintiff's statements, and having satisfied himself of the truth of them, on the 29th of *August*, 1865, delivered his judgment, which concluded in these terms:—"Under these circumstances, I consider it proved, that from the 13th of *February*, 1844, to the year of annexation, the Plaintiff's Husband, *Kali Pershad Singh*, enjoyed the proprietary right in the *Deotaha Illaqua*, only paying the Government *jumma* to the *Talookdar* of *Bhinga*," and therefore, recorded a decree in her favour, under rules in force for the settlement of the estate (a), *plus 5 per cent.* on the Government *jumma*, payable to the *Talookdar* of *Bhinga* for cost of collection.

There does not appear to have been any appeal or objection to this judgment, but on the 7th of *September*, 1863, the case was remitted by the Commissioner of *Fyzabad*, in order to have the statements of the Defendants more formally taken and their cases tried separately, and additional inquiries made, which appeared to the Commissioner necessary to elicit the material facts.

In accordance with this Order, the same Deputy Commissioner took up first the Appellant's case against one of the Respondents, *Surubjeet Singh*, in respect of village *Assoogpore*, one of the villages of

(a) The rules or minutes here referred to appear to be those made by the Chief Commissioner of *Oude*, to which the force of Law was given by Act, No. XXVI. of 1866. See Schedule to Act.

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the *Deotaha* estate, granted to him. The Deputy Commissioner in his proceedings referred to various receipts and a *Firman* filed, which showed that *Juggut Singh* and *Kalee Pershad Singh* had paid the *Oude* Government the revenue of the *Deotaha* estate at various times, and he recorded that "*Surubjeet Singh* appears by Agent, *Salar Khan*, but has nothing to say apparently in refutation of the documents produced." He ended his minute thus:—"This addittonal inquiry has, I think, only tended to confirm the opinion formed of the case when submitting my report of the estate, dated the 25th of *January*, 1865, and my subsequent finding dated the 29th of *August*, 1865, and, therefore, recapitulation seems uncalled for. The only modification of my finding that seems called for, is, that as the *Rajah* of *Bhinga* estate was not covered by a *Sunnud*, the Plaintiff seems entitled to the settlement of the estate direct from the Government."

From this Order *Surubjeet Singh* appealed to the Commissioner, Mr. *H. S. Reed*, who on the 22nd of *August*, 1866, remitted the case again to the Deputy Commissioner, to inquire as to certain Hindie Letters, alleged by the Appellant to be material and not sufficiently inquired into by the Deputy Commissioner, and to have further oral evidence taken as to who had received the rents of the *Deotaha* estate. The Commissioner went very fully into the evidence, and agreed fully with the finding as to the *Deotaha* estate having been the property of the Appellant, and as to the hardship of her case.

The Deputy Commissioner, Mr. *J. S. Ross*, upon the remaind, having taken the evidence directed and gone into the inquiry as to the alleged Letters, concluded his observations on the further evidence by



saying : " I, therefore, see no valid grounds for altering my opinion originally expressed with regard to the settlement of the village with the Respondent," and forwarded the file to the Commissioner.

The Commissioner, Mr. *H. S. Reed*, on the 27th of *March*, 1867, took up the appeal again, went into the fresh evidence returned by the Deputy Commissioner, and dismissed the appeal, and thereby confirmed the original Order of the Lower Court of the 29th of *August*, 1865.

No appeal from the judgment of the Commissioner appeared to have been preferred to the Financial Commissioner under the provisions of Act, No. XXVI. of 1865. After the time had elapsed for appeal against the decree of the Commissioner, the Deputy Commissioner of *Gondah* brought the matter to the notice of the Officiating Commissioner of *Fyzahbad*, Mr. *Carnegie*, who was acting temporarily in the absence of Mr. *H. S. Reed*, the Commissioner who had passed the decree on the appeal, and recommended that the Appellant should be put in possession of the *Deotaha* villages. Mr. *Carnegie* objected to the execution of the decree, assigned, various errors in it, and referred the matter, with his observations, to the Financial Commissioner, who referred the matter back for the consideration of Mr. *H. S. Reed*, who, on the 25th of *October*, 1867, addressed a memorandum of observations on Mr. *Carnegie's* strictures to the Financial Commissioner, in which he upheld his former judgment, and pointed out the wrong done to the Appellant and the irregularity of the suggestion made to quash the decrees of two Courts which had jurisdiction over the case, after the time for appeal

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had passed, and on the grounds suggested by Mr. *Carnegie*.

The Financial Commissioner, Mr. *R. H. Davies*, on the 4th of *December*, 1867, passed the following Order and decree:—"The Financial Commissioner is of opinion, that plea 3, viz., that the summary settlement 1858-59, having been made with the *Rajah* of *Bhinga*, the decrees of the Lower Courts, awarding the full proprietary rights to *Thukrain Sookraj Koowar*, militates against the Government Letters or Orders of the 10th of *October*, 1859, must be held to be good. The *Rajah*, under those Orders, became the full proprietor, and any rights formerly engaged by his relations were thereby annulled. Therefore, even if it were clearly proved, as held by the Lower Court, that *Thukrain Sookraj Koowar* was the true proprietor up to the summary settlements, and that she afterwards continued in possession of her right without disturbance by the *Rajah*, still, as her title, if she had one, was transferred to the *Rajah*, she cannot now plead it successfully. But, although the Courts decreed full proprietary right to her, her original claim was to a sub-settlement as under proprietor. It remains to decide whether this can be maintained. It is to be observed that the villages in dispute were not conferred on the *Rajah* by *Sunnud*, for they were confiscated before a *Sunnud* had been issued, owing to the *Rajah's* concealment of Cannon. *Thukrain Sookraj Koowar*, therefore, can only claim the benefit of any Order given in her favour in the Letter of the 10th of *October*, 1859. But the Letter, unfortunately, contains no clause in favour of any parties, except inferior *Zemindars* and village occupants, amongst whom *Thuk-*



*rain Sookraj Koowar* cannot be classed. Furthermore, her claim to the sub-settlement is barred also by the interpretation given in paragraph 7 of the Chief Commissioner's minute on Act, No. XXVI. of 1866, which identifies 'under proprietary right' with the right of a person who was in possession of the proprietary right at the time the village was incorporated in the *Talook*. Under this definition, no relative of a *Talookdar*, however long he may have held full apparent hereditary and proprietary possession of a *Mehal* within a *Talook*, can obtain a sub-settlement, unless it can be shown that the *Mehal* in question has been held at some interval under distinct revenue engagements with the native Government," and decreed that the Orders of the Lower Courts be reversed, and the claim of the Appellant to both the proprietary rights and sub-settlement of *Mouzah Assoogpore, Illaka Deotaha*, dismissed.

A review of the Financial Commissioner's Order on various grounds, including the absence of appeal in due time against the decree of the Court below, was applied for and refused. Afterwards permission to appeal to Her Majesty in Council was granted. The appeal from the Order of the 4th of *December*, 1867, now came on for hearing.

Sir *R. Palmer*, Q.C., and Mr. *Doyne*, for the Appellant.

We submit, that the Financial Commissioner was wrong in holding, that the Letters or Orders of the 10th of *October*, 1859, vested in the *Rajah* lands which had been previously confiscated by the Government, or that the effect of those Orders or of the settlement made with him, was to prejudice or affect any subordinate interests in any portion of the lands included in his

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settlement. There is nothing either in the Act, No. XXVI. of 1866, or in the rules, dated the 20th of *August*, 1866 (*a*), made by the Chief Commissioner of *Oude* hostile to the Appellant's claim, which really falls within both the letter and equity of that Act, and of the interpretation put upon it by the Chief Commissioner. The Orders of the Lower Court were correct, and, we contend, that the Appellant is entitled to a settlement of the *Deotaha* estate, and that there has been no annulment of her previous admitted rights, by reason either of the settlement made with the *Rajah* of *Bhinga*, who stood in relation of Trustee for her, or the Orders of Government in respect of this *Mehal*.

Mr. *Forsyth*, Q.C., and Mr. *H. C. Merivale*,  
 for the Government,

Contended, first, that the confiscation and grant of the *Deotaha* estate to *Oude* loyalists were acts of State (Proclamation of Lord *Canning*, of the 30th of *April*, 1858), and deprived the Appellant of any right of property she might have had as regarded her proprietary rights, the settlement being made with the *Rajah* of *Bhinga*, and that the Appellant, therefore, could not question the Government's right in a civil proceeding. Secondly, as to the sub-proprietary interest, that the Appellant was not in a position in law to claim a sub-settlement, as the *Deotaha* estate was formally incorporated with the *Bhinga Talook*, and held *Benamee*, and as the *Rajah*, the ostensible Owner, consented to its being disposed of, even to the prejudice of the real Owner, the latter could not be allowed to object, *Brojonath Ghose v. Koylash Chunder Bannerjee* (*b*); and further, that the *Rajah*

(*a*) See Schedule to Act.

(*b*) 9 W. R. 593.



was the registered Owner, and the *Deotaha* estate was selected by himself for the half part of his *Talook* to meet the confiscation.

Their Lordships, without calling for a reply, pronounced judgement by

The Right Hon. The Lord Justice JAMES :—

The Plaintiff, the Appellant, is the Widow and heir of a deceased *Oude* nobleman, the representative of the cadet branch, as the *Rajah* of *Bhinga* is the representative of the elder branch of a great *Oude* family. The *Rajah* was the *Talookdar* of a great *Talook*. The younger branch had their separate ancestral estate, the *Gowa* estate, wholly distinct from and independent of the *Talook* of the elder branch. But many years ago it was, in the then state of things in *Oude*, thought desirable that both estates should be, as to their relations with the *Oude* Government, united in one great *Talookdary*, the head of the elder branch representing the whole, whether in submission or in resistance to the exactions of the Court of *Lucknow* does not appear; the younger branch continuing, however, in undisturbed and absolute possession as the proprietor of his own villages, and paying only its proportion of the *jumma* assessed on the whole. This was the state of things at the time of the annexation of *Oude* by the British power. While the British authorities were in course of making the settlement of their new acquisition, the Husband of the Appellant was minded to apply for a distinct settlement with himself, there being no longer the motive, as he thought, for covering himself with the name and protection of the *Rajah* of *Bhinga*. He apparently thought that under

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British law and British rule his estate would be as safe as the domain of the most powerful *Talookdar*.

The *Rajah*, however, wrote to dissuade him from this step in a Letter in which, while desiring to retain the nominal *Talookdary* of the whole, he acknowledges in the clearest terms the right of his relation, and pledges himself that the possession of the *Mehal* by the latter shall be respected and safe.

Before anything was done, the great outbreak in *Oude* took place. After it was subdued, the arrangements for a settlement were resumed. In the meantime the Plaintiff's Husband had died; the *Rajah* hearing that the Widow, the Plaintiff, was of the same mind as her Husband, and desirous of placing herself immediately under the British *Sircar*, wrote her Letter similar to the one he had formerly addressed to her Husband.

The summary or provisional settlement was made with the *Rajah*; but before the *Rajah* had obtained his regular settlement, and the *Sunnud* which would have been his formal grant, he incurred the grave displeasure of the authorities, some Arms being found concealed by him, and an Order went forth confiscating half his estate. The *Rajah* concealed from the Government Official the real ownership of the Appellant's villages, and contrived that they should be taken to satisfy in part the Order of confiscation. The Appellant naturally remonstrated and petitioned, but in vain; she petitioned again, and again her second petition, like the first, was unheeded. At length, however, she succeeded in obtaining a hearing. She was told to bring, and did bring, her suit for the restitution of her villages and a settlement. The case was investigated with a care which cannot



be too highly praised, and the Assistant Commissioner, acting as Judge, pronounced in the Lady's favour, that she was entitled to have the villages settled with her as a subordinate tenure to the *Talook*. From this decision, an appeal was presented to the Deputy Commissioner, who, thinking that there were some technical deficiencies in respect of some of the details, desired a still further and fuller investigation. The result was, that the Assistant Commissioner re-stated his former conclusion and judgment, but with a modification that the settlement was to be made with her directly, and not as a sub-proprietor; and the Deputy Commissioner, who had evidently taken great pains with the case, affirmed that decision.

The matter should have rested there. It appears, however, that the Appellant's villages had been included in grants to *Oude* loyalists, in reward for their loyal services to the State, and it was thought that it would be very embarrassing if the Grantees were to be obliged to give up the subject of their grants to the rightful Owner; and, accordingly, a further appeal was made to the Chief Commissioner, who reversed the decrees of the subordinate Officers, and the poor Widow was thereby left stripped of her whole property. From this decree the present appeal is brought.

It has been attempted to be justified on the legislation which existed in *Oude* on the effect of the new settlement, and on the well-known Letters of the Governor General in Council, addressed to the Landowners of *Oude*, the one announcing the confiscation of existing tenures, and making a *tabula rasa*, the other the Letter of grace and restoration. It is

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contended, that the effect of the settlement with the *Rajah* under the second Letter was to make him the absolute Owner of the whole estate, including what had been the Appellant's village.

Their Lordships are satisfied that that legislation and that Letter have no such effect. The object and meaning of that Letter are well known and very clear. Soon after the annexation, it was suggested that the true and normal proprietorship of the land in *Onde* was that ownership by village communities which had been discovered or established in the *North-West* Provinces, and that the alleged *Talookdary* and *Zemindary* rights were simply a recent usurpation due to the violence and fraud which had marked the last year of the *Oude* monarchy; that at all events many of the individual *Talookdars* and *Zemindars* had by violence and fraud or the corruption of the Government possessed themselves of other people's estates. The old question, moreover, was further mooted whether a *Zemindar* was really an hereditary Landlord or only a Government functionary.

The *Talookdars* and *Zemindars* were threatened with an universal *quo warranto*.

It was to announce the abandonment of this policy, and to quiet men's titles and possessions, that the Letter was written. It said, in substance, we acknowledge the *Talookdary* tenure—we acknowledge that the tenure does confer an hereditary lordship descendible in fee simple, and we will not allow the existing titles to be disturbed by old dormant claims. At the same time we preserve, in like manner, all the rights of your subordinate *Zemindars* and *Ryots*, whose rights and the rights of persons entitled to *Seer* and *Nanka* you shall respect as



we respect yours. For that purpose and to that extent an absolute title was given to the person who was settled with as *Talookdar*, with the fullest powers of alienation, and consequently of binding his right by contract, so that effect may be given to the rights of persons not claiming adversely to the registered title, but claiming, by agreement with him an old estate, consistently with that title. In English language, it gave the registered *Talookdar* the absolute legal title as against the State and against adverse Claimants to the *Talookdary*; but it did not relieve the *Talookdar* from any equitable rights to which he might have subjected himself with a view to the completion of the settlement by his own valid agreement. In this case the Appellant was the acknowledged *cestui que* trust of the registered *Talookdar*, who had bound himself expressly in writing that he would respect her rights if she permitted him to be alone so registered.

It would be a scandal to any legislation if it arbitrarily and without any assignable reason swept away such rights; and in this very painful case it is at all events agreeable to their Lordships to find that no such scandal attaches to the Laws or Regulations or Government Acts in force in *Oude*; and that the cruel wrong of which this Lady has been the victim is due to the misapprehension of the law by the Commissioner.

It is almost superfluous to observe that the Lady being clearly, as she was, the equitable Owner, the decree of confiscation against her Trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a

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sentence which, in effect, made her the sufferer for his offence.

Their Lordships are, therefore, of opinion and will recommend, that the judgment of the Financial Commissioner be reversed, and that the judgment of the Deputy Commissioner, affirming the decision of the Assistant Commissioner, be affirmed.

The Appellant will have her costs of this appeal, and also the costs of the proceedings in both the Courts below.

Their Lordships cannot but express a hope that, by an act of prompt justice and a liberal estimate of what is due to this Lady, the Government will relieve her from further litigation. She had two decisions in her favour carefully and correctly adjudged, which, as they were consistent with the plainest principles of justice, it should have been the effort of an appellate Tribunal, unless the law controlled it, to maintain.

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FUTTEH CHUND SAHOO ... Appellant ;

AND

LEELUMBER SINGH DOSS and others ... Respondents.\*

*On appeal from the High Court of Judicature at  
Fort William, Bengal.*

THIS was a suit for specific performance of an agreement for sale real estate, instituted by the Appellant against the Respondents. The object of the suit was to obtain a decree for the execution of a Deed of absolute sale, founded on an alleged agreement between the Appellant and Respondents, with an Order for registration and possession of the land the subject of the suit. The only question raised by the appeal was, whether an unregistered agreement could be received in evidence under the registration Act, No. XX. of 1866, cl. 2, sect. 17, and sect. 49.

The principal *Sudder Ameen* (*Baboo Norotum Mullick*) admitted the agreement as evidence, and decreed in the appellant's favour. On appeal a Division

° Present : Members of the *Judicial committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

*prima facie* case of execution of documents falling under sects. 17 or 18, is made out to his satisfaction, has power to direct the instrument to be registered ; leaving the parties to try the question of forgery or non-forgery in a regular suit.

3rd & 4th  
July, 1871.

The Provisions of sect. 49 of the Registration Act No. XX of 1866, are imperative, and admit of no instrument being received in evidence in a civil suit, without being registered : registration being compulsory, by cl. 2, sect. 17, of that Act.

*semble* : Under the 84th sect. of the registration act, the District Judge, if a



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Bench of the High Court, consisting of the Justices *Kemp* and *Phear*, held that the agreement was an instrument within the meaning of cl. 2, sect. 17, of the Act, No. XX. of 1866, and that according to the provision of sect. 49 of that Act, it was not receivable in evidence in civil proceedings in any Court, unless it was registered according to the provisions of that Act. Hence the present appeal, which was argued by

Mr. *J. D. Bell*, for the Appellant, and

Mr. *Doyne*, for the Respondents.

At the conclusion of the agreement, Judgment was delivered by

The Right Hon. Sir JAMES COLVILE.

In this case, the Appellant brought his suit, which was in the nature of a Bill for specific performance, claiming to have the contract entered into by the instrument in question carried out, and, on the footing of that, a Deed of absolute sale executed; and he added that the suit was also for issuing "an Order for its registration." Their Lordships understand those words to import a prayer, that the Deed of absolute sale, when executed, might be ordered to be registered; and not to point to the registration of the instrument upon which the suit was brought. This prayer was probably inserted, with a view to meet the difficulties which it was apprehended might be occasioned by the prior registration of the Defendants' Deed of Sale of a date subsequent to that of the instrument on which the Appellant sued. The Court of First instance found that this instrument was not one which the Registration Act, then in force, required to be registered,



admitted it accordingly in evidence, and upon the merits, made a decree in favour of the Plaintiff. The case then went by appeal to the High Court, and the objection was there taken that the instrument being one which the Registration Act requires to be registered, and which had not been registered, it was not receivable in evidence, and that, therefore, there was no foundation for the Plaintiff's suit. The High Court entertained that objection, and the decision of the Court below was accordingly reversed, and the suit dismissed with costs. The appeal before us is against that decision.

It appears to their Lordships that, although this case is undoubtedly an extremely hard one, they are bound to affirm the decree of the High Court. The Registration Act, No. XX. of 1866, recently passed in *India*, is extremely stringent. Their Lordships have, in the first place, no doubt whatever, that the instrument in question is one which, by cl. 2 of section 17 of that Act, is required to be registered; that it is an instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question, and what in equity would operate as a sale of the property. The forty-ninth section of the Registration Act, says, that no document that has not been registered under the Act (supposing it is one which ought to be registered), is receivable in evidence. The procedure which the Act prescribes is of this kind: The party seeking to register a document is, under the thirty-sixth section, to go first before the Registrar, or, as in this case, a Sub-Registrar. If the Sub-Registrar refuses to register the document, there is then an appeal from his refusal, upon whatever reasons it is

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founded, to the Registrar, the next higher Officer and if that person confirms the Order refusing the registration, the eighty-fourth section gives to the party aggrieved the power of going by petition to the District Judge. In the present case the Sub-Registrar and afterwards the Registrar refused to register the instrument, because the Respondent, by whom it purported to have been executed, denied that he had executed it. It has been argued, that the Act affords no means for trying such an issue as was thus raised; and consequently, that unless the unregistered instrument be admitted in evidence in a regular suit wherein the fact of its execution could be tried, the right of the party claiming under it would be defeated by the false and dishonest denial of his own signature by the opposite party. Their Lordships, however, looking to the words of the eighty-fourth section, and the form of the petition given in the schedule, and in the particular to the fourth paragraph of that form, which contains the words "the said C. D. appeared personally before the said Sub-Registrar and falsely denied the execution of such instrument," think that the *Zillah* Judge would have jurisdiction to determine such a question. Power is expressly given to him to summon the parties, and their Lordships imagine, that there must also be power to summon Witnesses, if examination of Witnesses should be necessary. How the *Zillah* Judges may deal with this statutory jurisdiction their Lordships are unable to say. It seems, however, reasonable to suppose, that if they saw that a *primâ facie* case of execution of the Deed was made out, they would direct the document to be registered, and refer the parties to try the question of forgery or non-forgery in a



regular suit. Such a decision would not finally bind the rights of the party denying the execution of the document; and, on the other hand, it would not preclude the opposite party from proving in a less summary proceeding that the denial was false. Their Lordships must assume, in the absence of any proof to the contrary, that the Judges exercise this jurisdiction in a reasonable and proper manner.

Well, then, how do the facts stand upon this case? The Appellant went before the Sub-Registrar, and then he appealed to the Registrar. He then, unfortunately for himself, through bad advice or some other cause, omitted to proceed as the Act directs under the eighty-fourth section, in which case he might have obtained the registration of the Deed of agreement in the way before suggested, or brought a suit relying on a non-registered Deed. He failed to pursue the remedies given him by that section of the Act, or at least to exhaust those remedies. It seems impossible to their Lordships, under these circumstances, to say that, acting under the provisions of a very useful, though stringent Act, the Judges of the High Court have miscarried in ruling that the instrument, not having been registered, was inadmissible in evidence, and that the Plaintiff's suit had on that ground wholly failed. Their Lordships feel that this may be a very hard case; they would willingly have relieved the party if they could, but to make any special Order, such as that suggested by Mr. *Bell*, seems to their Lordships to be beyond the functions and province of an appellate Court. It may be that, the Appellant may be able partially to obtain relief, since part of the consideration money seems to be

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dent to the Appellant. The Plaintiff's Pleader also stated that, "affairs had gone on according to custom ; and that there was no written contract between the *Mahajun* and *Aurtidars*."

The Appellant examined Witnesses before the Principal *Sudder Ameen*. The effect of their evidence upon the different sorts of agency, namely, the *Puckah* or *del credere* and *Kutcha Aurti*, or irresponsible agency, was that the commission in the former was about Rs. 12, and the latter Rs. 18 to Rs. 20.

The Respondent also examined Witnesses ; all of whom except one Witness were unconnected with either party, and, speaking from their experience as Dealers and Brokers in the Cotton trade in *Zeagunge*, deposed that the rate of commission admittedly paid by the Appellant was ordinarily paid for *Kutcha Aurti*, and that in his transactions with various of the Witnesses as Purchasers, the Appellant was in the habit of receiving payment direct. The Respondent filed receipts to show the practice referred to in her written statement, and decrees obtained by the Appellant in various suits brought by him against Purchasers of Cotton, also extracts from the Respondent's account Book for the years from 1264 to 1268, to show that no entries were there made of any liability existing such as the Appellant asserted.

On this evidence, the Principal *Sudder Ameen*, (*Degumber Biswas*), on the 31st of *December*, 1864, delivered judgment, and dismissed the Appellant's suit with costs. He held that limitation did not bar the suit, as the dealings had been carried on up to the year before the institution of the suit. On the merits, the principal *Sudder Ameen* held, that the evidence had wholly disproved the Appellant's



case and established that of the Respondent; that the brining of suits by the *Arrutdar* in some instances was quite consistent with the practice of taking receipts from constituents and then suing as alleged by the Respondent, and that the Appellant had wholly failed to prove the adjustment, unsigned as it was, by any of the Respondent's servants.

From this judgment the Appellant appealed to the High Court, relying chiefly on the ground that he had proved his case generally as to the character of the transactions and as to the adjustments.

On the 23rd June, 1865, a Division Bench of the High Court, composed of Messrs. *Steer* and *Morgan* remanded the case for a new trial and a further investigation, and directed both parties to produce further evidence, and the Respondent to produce her Books and servants for examination as to the adjustment of accounts.

The reasons given in the judgment for this remand were, that the *Aurtidarry* transactions between the two Firms extended over a period of upwards of seventy years, and the dispute which had recently arose between them, and which had led to the suit, was one which there ought to be no real difficulty in deciding, for there must have been ample materials to show the terms on which the Defendant, the *Aurtidar*, acted for the Plaintiff, the *Beparee*. That the rate of commission payable to the former (Rs. 12: 8) was not in dispute evidence having been given to show that a higher rate (from Rs. 18 to Rs. 20, or thereabouts) was usually charged by *Aurtidars* where they took upon themselves the whole responsibility of the sale and forthwith account for the proceeds to the *Beparee*; but that this was not the precise footing on which business was

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transacted between the parties to the suit. That it was shown that a commission, varying from Rs. 6 to Rs. 10 or Rs. 12, was payable to *Aurtidars* where they undertake no responsibility whatsoever. That the contest in the case was, whether the *Aurtidary* was of the *Kutcha* description, as the Defendant alleged, or was *Puckah*, involving some liability on every sale, and a liability to pay at the expiration of the period of credit (30 days) allowed to Purchasers, or if not then, at any time afterwards when any outstanding remained unpaid by the Purchasers to the Plaintiff. That it is not put that the Defendant was liable only in case the amount was irrecoverable from the Purchasers by the *Beparees*. That it was certain, that the Plaintiff retained the right to sue the Purchasers, and also that, under certain circumstances, at least, the *Aurtidar* (the Defendant) had likewise a right to sue the Purchasers, and the Court concluded in these terms. "We think that the Plaintiff has established such a case as requires the Defendant to rebut it; she has only to produce the accounts, and the truth or falseness of the Plaintiff's case may, probably, be shown at once. If they show that there is nothing whatever due to the Plaintiff, or that the balance due to the Plaintiff is not anything like the sum claimed, there will be reason to conclude that the story of an adjustment and a settlement on the basis of the account filed by the Plaintiff is false. We think the Plaintiff has made out a case,—if not a complete case, at least a *primâ facie* one."

The question of limitation of suit was not considered by the Court on this occasion.

The case having gone back to the same Principal *Sudder Ameen* for re-trial, the Appellant examined



further Witnesses, and also gave in evidence his own deposition. Upon the question of the amount of commission he put in two Letters, purporting to be from the Respondent's Firm, one of which, dated the 3rd *Pous, Sumbut* 1915, admitted a balance as due to the Appellant of Rs. 18,909 : 6 : 9 upon adjustment.

The Respondent examined her *Dewan* and other Witnesses.

On the 30th *December*, 1865, the Principal *Sudder Ameen* who had delivered the previous judgment dismissing the Appellant's suit, pronounced his second judgment, and decreed the Appellant the whole amount of his claim. He refused to allow the question of limitation to be re-opened.

From this judgment the Respondent appealed to the High Court on the ground, *inter alia*, that the Principal *Sudder Ameen* was wrong in refusing to try the plea of limitation.

On the 24th of *January*, 1867, the appeal was heard before a Division Bench of the High Court, composed of the Chief Justice, Sir *Barnes Peacock*, and Mr. Justice *Jackson*. The Chief Justice delivered judgment, dismissing the Plaintiff's suit on the issue as to limitation alone, deciding that it was not a case falling within sect. 8 of Act, No. XIV. of 1859, which relates to suits for balances of accounts current between Merchants and Traders who have had mutual dealings, as the Respondent's contention was, that of a mere Agent, and that if it did so fall it was equally barred; but that the case fell within sect. 1, cl. 9, of that Act.

The appeal was from this decree.

Mr. *Leith*, for the Appellant.

Although the High Court, was right in deciding

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that there was an engagement on the part of the Respondent, the *Aurtidar*, that he would sell the Appellant's Cotton, and that he would guarantee the Purchasers, the Court was wrong in deciding that the case fell within cl. 9, sect. 1, of Act, No. XIV. of 1859, on the ground that it was a suit for the breach of a contract within the meaning of that clause, and that, therefore, the period of limitation was three years from the date of such breach of contract. The Court ought to have decided that it was a suit for a balance of account on an account current between Merchants and Traders who have had mutual dealings within the 8th section of that Act, *Webber v. Tivill* (a), *Catling v. Skoulding* (b), *Cranch v. Kirkman* (c) *Martin v. Delboe* (d), and not treated it as a suit for breach of contract, or for damages in respect thereof. *Roghooburdial Mundur v. Christian* (e). There is no reference made in section 8 to the three years' limitation, provided by cl. 9 of sect. 1. That being so, the suit, being for a balance of account, necessarily falls within the general provisions contained in cl. 16 of sect. 1, which enacts, that all suits for which no other limitation is by the Act expressly provided; the period of six years from the time the cause of action arose the right to sue accrues, *Gopal Chunder Shaha v. Sinaes* (f), *Ramjay Dey v. Srinath Sing* (g). Here the present was brought within six years when the cause of action provided by sect. 8 arose.

Mr. *Doyne*, for the Respondent.

It is clear from the pleadings, first, that the Appellant admitted that the commission he paid the Respon-

(a) 2 Saund., 127.

(b) 6 Term Rep., 189.

(c) Peake's N. P., 164, See Note, *ib.*

(d) 1 Lev., 298.

(e) 3 W. R., 123.

(f) 8 W. R., 4.

(g) 2 Ben. Law. Rep., App. Jur., 170.



dent was Rs. 11 : 8, and no more, the *Chootki* being a commission paid by the Purchaser ; and secondly, that the Respondent became liable immediately on sale of the Cotton for the proceeds, after deduction of commission. With respect to the plea of limitation, after the abandonment of the allegation as to account stated, the burthen was on the Appellant to show why under Act, No. XIV. of 1859, cl. 1, sect. 9, he had not sued within three years from the accruing of any item of the debt alleged by him to be due from the Respondent. On the merits it is insisted, that according to the custom of the trade, an *Aurtidar* receiving a commission of Rs. 11 : 2 *per* hundred *maunds* would be liable for net sale price as if he were the Purchaser himself.

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Judgment was reserved, and now delivered by

The Right Hon. The Lord Justice MELLISH.

17th July  
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This was a suit brought by the Appellant, who was the Manager of a Factory in *Moorshedabad*, against the Respondent, who carried on an old established business of Broker, to recover a sum of Rs. 16,051 and interest, alleged to be due on the balance of an account. The Defendant had for several years sold the goods of the Plaintiff's Firm, and according to the finding of the Principal *Sudder Ameen*, the correctness of which was not disputed before us, had received a *Puckah* or *del credere* commission, which made her liable to the Plaintiff for all goods sold which were not paid for by the Purchasers. As there was no proof that any part of the price of the goods in respect of which this suit was brought had been received by the Defendant, the claim against the Defendant was only supported upon the ground that as she received a *del-*



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*credere* commission, she was liable for the price of all goods sold by her for the Plaintiff. It was admitted, that the cause of action for the last item in the account had accrued more than three years, but that there were items in the account which had occurred within six years from the commencement of the suit. The Act of Limitation of suits was pleaded, and the sole question to be determined is, whether under the circumstances, previously stated, the suit is barred by the Act of Limitation of suits, No. XIV. of 1859. The High Court held, that the case came within cl. 9 of the first section, as a suit brought for breach of a contract, and the Chief Justice in giving judgment says, "Although no express contract was proved to have been entered into between the parties, still their dealings were evidence from which it might properly be assumed they had agreed to carry on business on the terms we find them carrying on. It was an engagement on the part of the Defendant that she would sell the Plaintiff's Cotton, and that she would guarantee the Purchasers. There was a liability on the part of the Defendant not arising from a wrong, but a liability arising out of an engagement which she must be assumed to have entered into with the Plaintiff. It, therefore, falls within cl. 9 of section 1. It is a suit for breach of contract not in writing." It was urged before us on the part of the Appellant that the High Court had put a wrong construction on the words "breach of contract," as used in the clause; that these words are not there used for the purpose of distinguishing actions founded on contract from actions founded on tort, but for the purpose of distinguishing actions to recover unliquidated damages for breach of contract, from actions to recover debts, and that the enumera-



tion in the clause itself and in the 8th clause of several debts with respect to which the period of limitation is to be three years, proves that it could not have been intended to make the limitation for all debts three years under the words "breach of contract," and that the present suit was, in substance, a suit to recover a debt or liquidated sum of money, and that the period of limitation was six years under the 16th clause of section 1. Several cases were cited from the Indian Courts, and it appears from them that much difference of opinion has prevailed among the Judges in *India* respecting the proper construction to be put on the words "for the breach of any contract" in the 9th clause of sect. 1. Their Lordships do not think it necessary or advisable that they should attempt on the present occasion to lay down what is the proper construction of these words as applicable to all cases. It is sufficient to say, that it appears impossible to them to put so narrow a construction upon them as not to include the case now before them. The real Debtors for the price of the goods sold are the Purchasers of the goods, and the Broker is only sued upon her collateral undertaking that in consideration of the commission paid to her she will pay the price of the goods if the Purchaser fails to do so. An action in such an undertaking is an action on an express contract, and the sums which can be recovered under it are damages for a breach of contract.

Their Lordships, therefore, are of opinion, that the judgment of the High Court was correct, and they will recommend to her Majesty that the appeal should be dismissed, with costs.

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*G. N. D.*  
 Advocate High Court  
 Jammu & Kashmir



BROJONATH KOONDOO CHOWDRY }  
and others ... } *Appellants ;*

AND

KHELUT CHUNDER GHOSE ... *Respondents.\**

*On appeal from the High Court of Judicature at  
Fort William, Bengal.*

4th July,  
1871.

A Mortgage made in 1845 in the English form, contained a proviso for redemption, and for the Mortgagor continuing in possession until default in payment, in which event the mortgage Deed gave a right of entry to the Mortgagee. De-

THE question in this appeal was one of limitation of suit, under Act, No. XIV. of 1859. The Appellants were the possessors of a decree of foreclosure of an estate belonging to one *Unnoda Persaud Roy*, and by him mortgaged by two Deeds made in the English form, in 1840 and 1845, with the usual proviso for redemption, and also providing for the Mortgagor remaining in possession, until default, when a right of entry was given to the Mortgagee,

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

fault was made in payment of the mortgage money by the Mortgagor, but no steps were taken by the Mortgagee to obtain possession. In 1849 the Mortgagor sold part of the mortgaged estate, and the Purchaser entered into possession and registered his title. The Assignee of the Mortgagee afterwards brought a suit for foreclosure to which the Purchaser was not made a party, and in the year 1862 obtained a decree for foreclosure. In a suit brought by the Assignee of the Mortgagee against the Purchaser for possession of that part of the estate so purchased by him from the Mortgagor, held, by the Judicial Committee, affirming the judgment of the High Court at *Calcutta*, that as the Mortgagor after default, and the Purchaser under him, had been in possession for more than twelve years before the suit for possession was instituted, the Limitation of suits Act, No. XIV. of 1859, sect. 1, cl. 12, was a bar to the suit.



*Unnoda Persaud Roy*, the Mortgagee, remained in possession notwithstanding that default was made in payment of the Mortgage money, and sold a portion of the mortgaged estate to *Gooroochurn Sein*, to whom the property was conveyed, and his name registered. The Respondent was a Purchaser from *Gooroochurn Sein*. On the 27th of *August*, 1863, more than twelve years after the sale by the Mortgagor, the Appellants, and others, filed their plaint in the Court of the Principal *Sudder Ameen* of *Zillah Hoogly*, against *Unnoda Persaud Roy*, the original Mortgagor, *Gooroochurn Sein*, the Purchaser, and the Respondent, for foreclosure of the mortgage. The plaint contained an allegation, that *Unnoda Persaud Roy* had, while the lands sued for were under mortgage, fraudulently sold them to *Gooroochurn Sein*, without the knowledge of the Mortgagee, and that the plaintiffs had not come to the knowledge of such a sale, and possession being held thereunder until *August*, 1863, at which time they insisted the cause of action accrued. The Principal *Sudder Ameen*, by his decree, dated the 8th of *March*, 1864, decided in favour of the Plaintiffs, and ordered possession of the land sued for to be given to them, with costs. In his judgment the *Sudder Ameen* held, that the Plaintiffs' (the Appellants) claim was not barred by limitation, as the right of possession only accrued from the date of the decree in the foreclosure suit. The Respondent appealed from this decision to the High Court of Judicature at *Calcutta*, and after various proceedings, that Court, consisting of the Chief Justice *Sir Barnes Peacock*, and Mr. Justice *Jackson*, by their final judgment, reversed the decree of the Principal *Sudder Ameen*, and held that the Appellants' suit was barred by

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limimitation, as under the mortgage Deed of the 4th of *October*, 1845, the mortgagee was bound to have sued and recovered possession of the mortgaged estate, on default being made in payment of the mortgage debt at the date due, namely, the 4th of *April*, 1848, and that his cause of action having accrued on that date, and the suit not having been brought until nearly fourteen years afterwards, the Appellants were barred by adverse possession, under Act, No. XIV. of 1859, sect. 1, cl. 12.

From this decree the present appeal was brought.

Sir *R. Palmer*, Q.C., and *Mr. Doyne*, for the Appellants,

Argued, that the High Court was wrong in holding, that the possession of the Mortgagor and his Vendee was, from the time of default in payment of the mortgage money, adverse to the Mortgagee or his Assignees, the Appellants. That there was no adverse possession prior to the Respondent's decree of foreclosure in 1862, and, therefore, that the suit was not barred by the Limitation of suits Act, No. XIV. of 1859, sec. 1, cl. 12.

Mr. *J. D. Bell*, for the Respondent,

Contended, first, that the sale to the Respondent was a *bonâ fide* purchase for value, and that he, not being a party, was not affected by the proceedings in the foreclosure suit; and, secondly, that the claim of the Appellants, as Assignees of the original Mortgagee, was barred by the Limitation of suits Act, No. XIV. of 1859, sect. 1, cl. 12, more than twelve years having elapsed from the date within which a



suit to recover possession of immovable property could be brought under that Act.

In addition to Act, No. XIV. of 1859, sect. 1, cl. 12, above referred to, *Ben. Reg. III. of 1793*, sect. 14, *Prannath Roy Chowdry v. Rookea Begum (a)*, and *Macpherson's Civil Proc.* [Ed. 1871], Appx. p. cciii., citing *Sel. Rep.*, v. 7, p. 45, referring to *S. D.* 1867, p. 1,816, were cited and referred to.

Judgment was reserved, and now delivered by

The Right Hon. the Lord Justice JAMES.

In this case the only question to be decided is, whether the High Court was justified in holding that the suit was barred by the Act of Limitations.

The Plaintiffs were Assignees of a Mortgagee, originally a puisne Mortgagee, but who had acquired the rights of the first Mortgagee, as afterwards stated.

The Defendant was the Purchaser from the Assignee in insolvency, of a person who had purchased the property in question from the Mortgagor. The original purchase from the Mortgagor was upwards of twelve years before the commencement of this suit, followed by registration and mutation of names in the Collector's Book, the Order for which was made on the 15th of *January*, 1850, and possession.

At the time of the sale the property was subject to a mortgage, made in the form of the English mortgage, with the usual proviso for redemption, and a proviso that the Mortgagor should continue in possession until default, and on default an express right of entry was given to the Mortgagee.

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(a) 7 Moore's Ind. App. Cases, 323.



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More than twelve years before the commencement of this suit such default was made.

After the sale under which the Defendant claims, the first Mortgagee instituted a suit for foreclosure in the late Supreme Court of *Calcutta*. This suit proceeded to a foreclosure *nisi* on the 11th of *December*, 1850, and which was made absolute on the 9th of *February*, 1852.

The Plaintiff in that suit, however, procured that foreclosure to be opened, paid off the first mortgagee, took a transfer of his mortgage, and then proceeded himself to foreclose the Mortgagor, and obtained his final decree for foreclosure on the 15th of *July*, 1862.

To these foreclosure proceedings the Purchaser of the property in question was not made a party, and it was of course held by the High Court that he was in no wise affected by those proceedings.

Having foreclosed his mortgage, the Appellants commenced this suit against the Defendant, who pleaded his twelve years' possession in bar. The plaint was filed the 27th of *August*, 1863.

The High Court has held that bar to be sufficient. Their Lordships do not doubt that such decision was correct. It was contended before them that so long as the mortgage security was a subsisting security, and dealt with as such, time did not run as between the Mortgagee, who was content to rest on his security, and the Mortgagor, who was permitted to remain in possession, and persons claiming under him; and it was also contended, that until the foreclosure put an end to the security it was a subsisting security, and that it was then, and not till then, that time began to run. It was further contended, that the Defendant, who derived his title under a pur-



chase from the Mortgagor, could not be in a more favourable position than the Mortgagor himself.

The foreclosure proceedings did not affect the Defendant, or the property in question, and it is difficult to see how a right of entry or cause of action against one man, in respect of his property, could be either lost or gained by proceedings against another man in respect of his property.

As against the Defendant the Plaintiff has acquired no right, except that which was conveyed to him by his securities.

The right under the mortgage Deed was to obtain possession of the land, and the cause of action accrued when default was made.

The words of section 1, cl. 12, of the Limitation of suits Act, No. XIV. of 1859, are—

“To suits for the recovery of immovable property or of any interest in immovable property, to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose.”

To this there is by sect. 6 one exception in respect of mortgages, which is this:—

“In suits in the Courts established by Royal Charter by a Mortgagee to recover from the Mortgagor the possession of the immovable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt.”

This exception does not apply to the present case, and where there is an express exception so limited to one special case of mortgage, it might plausibly be argued that it cannot be extended to any other case, even in the case of the original Mortgagor

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himself continuing in possession and paying interest to the Mortgagee.

The judgment of the High Court appears to be, that the bar extends even to such a case when not provided for by that section. The ruling, however, was not necessary for the determination of this suit.

It may, however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court, which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing Statutes of Limitation, and their Lordships, dealing with suits upon mortgages in the Native Courts of *India*, might, in the simple case of a Mortgagee and his Mortgagor being permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased. No such question, however, arises in the present case, for it is impossible to hold that the Defendant, the Purchaser, was holding or supposed that he was holding by the permission of the Mortgagee; and when both things concur—possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old—it is impossible to say that such a possession is not protected by the Law of Limitations.

Therefore, without expressing an opinion, whether the broader and more general rule laid down in the judgment of the High Court can be supported, their Lordships have no doubt that the decision in this case is correct.



It has been pressed on their Lordships that the decision will destroy the value of mortgage securities in *India*. Their Lordships do not share in that apprehension. It may be, and probably is, better that Mortgagees keeping their securities locked up in their strong Boxes, and allowing the Mortgagor to be the ostensible Owner in possession for a long series of years, should occasionally, as in this case, find themselves deprived of portions, more or less small, of the mortgaged property, than that *bonâ fide* Purchasers and persons claiming under them, after many years' possession, and perhaps much expenditure, should be evicted under a mortgage title perhaps half a century old, because somebody has been paying interest on the mortgage money. In the present case an actual mutation of names took place, and a very slight degree of vigilance would have enabled the Mortgagee to assert his title earlier.

Their Lordships will recommend that the judgment be affirmed, and the appeal dismissed with costs.

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HURRYHUR MOOKHOPADHYA ... *Appellant,*

AND

MADUB CHUNDER BABOO and } *Respondents.*  
 another ... }

AND

NOBOKISHTO MOOKERJEE ... *Appellant,*

AND

KOYLASCHUNDRO BUTTACHARJEE } *Respondents.\**  
 and others ... }

4th & 5th  
 July, 1871.

Review of  
 the Ben. Regs.  
 relating to  
*Lakhiraj*

tenures, within  
 the Provinces  
 included by  
 the Perpetual  
 Settlement.

Construction  
 of Act, No. X.  
 of 1859, sect.  
 28, in respect  
 to the opera-  
 tion of the law  
 of limitation  
 in suits

brought under

Ben. Regs. XIX. of 1793, sect. 10, and II of 1819, sect. 30, for resumption and assessment of lands as *mal*, or rent-paying lands, held as *Lakhiraj*.

A Plaintiff in a suit for resumption of land as part of his *mal Zemindary* for assessment, is bound in the first instance to prove a *prima facie* case (1) the payment of rent since 1790, or (2) that the land formed part of the *mal* assets of the estate at the Decennial Settlement. When such a *prima facie* case is made out, the *onus probandi* is shifted on the Defendant, who, to exempt himself from assessment, must show that his tenure existed rent-free before the 1st of *December, 1790*.

THESE appeals raised the same question; namely, on whom the *onus* of proof lie in suits by a *Zemindar*, or *Putneedar*, for resumption of rent-free tenures.

In the first appeal the Appellant filed his plaint in the Court of the Collector of *Hooghly*, alleging it to be instituted under the 30th sect. of *Ben. Reg. II.* of 1819, to uphold his *mal* rights under the Decen-

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

*Assessor* :—The Right Hon. Sir Lawrence Peel.



nial Settlement, to 92 *beegahs*, 13 *cottahs*, and 13 *chittacks* of *mal* land, in the village of *Jugguthub-luleporo*, which lay within and formed part of the Appellant's *zemindary* and *putnee talook*, which the Defendants (the Respondent) and others were holding as *Lakhiraj*. The plaint referred to a previous suit under Act, No. X. of 1859, sect. 28, in the Deputy Collector's Court. The Respondent, *Gooroo Buksh*, by his answer, claimed the lands sued for, except a small portion, as *Lukhiraj* and relied on the decision of the Collector in the suit under Act, No. X. of 1859, as a final adjudication.

After taking evidence, the Principal *Sudder, Ameen* (*Ramnarain Roy*), on the 9th of *April*, 1863, by his judgment held that the documents relied on by the Respondents to prove their *Lakhiraj* title were not shown to be genuine or applicable to the lands in suit, and decreed in favour of the Appellant in respect of all the lands sought to be assessed, except about two *beegahs*.

On appeal from this decree the Respondents relied on the limitation of suit and proof of their *Lakhiraj* title. A division Bench of the High Court, composed of Messrs. *Steer* and *Kemp*, on the 14th of *March*, 1864, dismissed the appeal.

A petition for review was presented, principally on the ground that, as the Appellant, in his plaint, had stated that the disputed lands were his *mal* lands, and, as he alleged, the Respondents' title to them had accrued after 1790, the High Court had erred in throwing the *onus* of proof on the Respondents.

The review of judgment was heard before Messrs. *Kemp* and *Glover* who admitted the review on one point only, namely, whether the *onus* had not been

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wrongly thrown, with reference to the full Bench decision in *Sonaton Ghose v. Moulvie Abdool Turrub* (a), which case, the High Court held, applied, and that the *onus* was on the *Zemindar*, and not on the *Lakhirajdar*, and that as the *onus* being on the *Zemindar*, the present Appellant, permission was given to amend his plaint, and to prove that the land was *mal*, by showing that he had received rent for the same. The suit was, therefore, remanded to the Lower Court for that purpose. The first appeal was brought from this decree remitting the suit.

In the second appeal the suit was brought by the Appellant *Nobokrishto Mookerjee*, against the Respondents. In his plaint he alleged himself to be the *Durputneedar* of the village named *Nusseerbattee*, and that the Defendants (the Respondents) were in possession of 18 *beegahs* 13½ *cottahs* of land, for which they held refused to pay him rent, on the ground that they held it as *Lakhiraj* from a date previous to *December*, 1790, and alleged that they had not been able to show their title, wherefore he claimed the right to assess the lands under *Ben. Regs. XIX. of 1793 and II. of 1819, sect. 30*, and other Acts in force.

The Respondents, by their answers, asserted first their *Lakhiraj* rights, and secondly relied on the limitation of suit. They put in evidence various grants to establish their *Lakhiraj* rights of dates previous to the Decennial Settlement. As to part of the lands, they insisted that they were not situate in the Appellant's *talook*.

By the decree of the Principal *Sudder Ameen* of *Hooghly* (*Nuzzeervodeen Mahmud*), dated the 9th of *July*, 1863, the Appellant's suit was dismissed, on the



ground that the Respondents had proved a valid *Lakhiraj* title, existing before the perpetual Settlement, and that the suit was barred by limitation.

On appeal, Mr. J. E. S. Lillie, the Judge of *Hooghly* Court, on the 21st of June, 1864, by his judgment, modified the decree of the Principal *Sudder Ameen*, and decreed for the Appellant all the lands in suit, except *Bulramporo*.

From this decision the Respondents appealed specially to the High Court, principally on the ground, that the *onus probandi* had been thrown on the wrong side, and that the Plaintiff ought to have been called upon to substantiate his allegations before the Defendants could be required to prove their plea.

On the 13th of April, 1865, a Division Bench of the High Court, composed of Messrs. *Seton-Karr* and *Campbell*, delivered judgment, to the effect, that the *onus* having been misplaced, the case was to be remitted to the First Court, with reference to the principles laid down in case 268 of 1864 (a).

(a) The judgment of Messrs. *Loch* and *Seton-Karr*, in the case No. 268 of 1864, *Khelut Chunder Ghose v. Poorno Chunder Roy*, above referred to, is from its importance, here set out :—

“ The Plaintiffs state that they seek to resume 33 *beeghas* 11 *cottahs* 12 *gundas* of invalid *Lakhiraj* land in the possession of the Defendants, situated within the limits of *Mouzah Sulkea*, appertaining to their *Zemindary*, *Pergunnah Paekan*, *Zillah Hooghly*. The suit is brought under the provisions of sect. 30, Reg. II. of 1819. The Defendant pleads that the suit is barred by limitation, as he and his predecessors have held possession of these lands, rent-free, from a period anterior to the assumption of the *Dewanny* by the late East India Company, that the lands are known as the ‘ *Feelk-hana*,’ and were granted by the *Nawab Nazim* of *Bengal* to *Santee Ram Singh* of *Jorasanko*; that they were inherited by his Son, and the property descended to his family, and it was last sold, in execution of a decree of the Supreme Court, on 7th of May, 1855

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Application was made for leave to appeal to Her Majesty in Council, though under the appealable and purchased by the Defendant (the Appellant) now in possession. The Lower Court found for the Plaintiffs, holding that the Defendant had failed to prove the validity of his tenure; and the Judge gave a decree for resumption, declaring the lands to pertain to the *mal* lands of the Plaintiff's *mehal*. An appeal was preferred by the Defendant, the hearing of which was deferred till the result of a reference to a Bench of seven Judges, in the case of *Sonatun Ghose and others*, special appeals No. 869, and of *Heeramonee Debya*, special appeals Nos. 1,29 and 1,291, was made known. The reasons for this reference may be shortly stated. Previous to the enactment of Act, No. X. of 1859, suits for the resumption and assessment of land held on invalid *Lakhiraj* title, whether under sect. 30, Reg. II. of 1819, or sect. 10, Reg. XIX. of 1793, used to be brought indiscriminately either in the Civil Court or before the Collector. It was very questionable, under the law as it then stood, whether the Collector had any jurisdiction in cases under sect. 10, Reg. XIX. of 1793, which related to lands alienated from a permanently settled estate subsequent to the 1st of *December*, 1790. But whether the law, correctly interpreted, admitted this jurisdiction or not, the hearing of such cases, as if they were brought under the provision of Reg. II. of 1819, by the Collector, had grown into a custom; and by the provisions of sec. 28, Act, No. X. of 1859, the jurisdiction of the Collector was distinctly extended to these cases. By the ruling of a Full Bench, in the case of *Bishumber Misser*, bearing date the 18th of *March*, 1863, it was held that cases thus tried by the Collector were suits, and not summary Orders; and a further question then arose, whether the Legislature, when creating this new jurisdiction in the Collector, intended to take away the jurisdiction over such suits from the Civil Courts, and vest it solely in the Collector. Another point had to be considered. The provisions of sect. 28, Act, No. X. of 1859, had introduced the law of limitation as barring the hearing of suits under sect. 10, Reg. XIX. of 1793, unless instituted within twelve years from the date that the Plaintiff's right of action accrued. But that law which remained unrepealed declared, that no length of possession should give validity to such grants. If then there were a concurrent jurisdiction in the Civil Court and the Collector, it was evident that in suits brought in the Civil Courts, limitation would



value, and the High Court, under the powers of the 39th sect. of the Letters Patent, in consequence of not apply, while in suits before the Collector the suit would be subject to a law of limitation. It was further argued, that one object of sect. 28 of Act, No. X. of 1859, was to draw a clear distinction between suits under sec. 10, Reg. XIX. of 1793, and suits under sect. 30, Reg. II. 1819, that the latter law related only to lands held as rent-free at or before the 1st of *December*, 1790, and that a suit brought by a *Zemindar* under the provisions of sec. 30, Reg. II. 1819, was an admission on his part of the existence of the tenure in 1790, and such admission was sufficient to bar his suit, unless he were an auction Purchaser at a sale for arrears of Government revenue. Owing, however, to the very confused state in which plaints were usually drawn up, the Plaintiff claiming to resume the lands as forming part of his permanently settled estate, which was a suit under sect. 10, Reg. XIX. 1793, and as invalid *Lakhiraj* under the provisions of sect. 30, Reg. II. 1819, it was difficult to know upon whom the *onus* of proof should be thrown. When the Plaintiff came with a distinct allegation, that the lands were part of his permanently settled estate, and had been subsequently separated from it by the Defendants, who held it as *Lakhiraj*, it appeared but reasonable, that the Plaintiff should start his case as in ordinary suits; but when he came in to resume, under sect. 30, Reg. II. 1819, that the burden should be on the Defendants. The practice, however, had been otherwise, and the burden of proof had always been thrown on the party claiming to hold as *Lakhirajdar*, not to prove the validity of his title, but to show that the tenure was in existence as *Lakhiraj* previous to the 1st *December*, 1790, before he could plead limitation. These were some of the reasons which rendered a reference to a Full Bench of seven Judges necessary; and the determination of the Court may be given under the following heads:—

First, that prior to the enactment of Reg. II. of 1819, the Civil Courts were competent under their ordinary jurisdiction to try suits from possession under sect. 10 of Reg. XIX. 1793.

Second, that Reg. II. of 1819 related only to suits for resumption of *Lakhiraj* existing prior to 1790, and that sect. 30 of Reg. II. 1819 did not extend the jurisdiction of Collectors to suit under sect. 10, Reg. XIX. 1793, and that from the time that law came

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the importance of the question raised, and, as the case was a representative one and would govern twenty-eight other analogous cases, leave was granted.

into operation there was a concurrent jurisdiction in the Civil Courts, and in the Collector to try those cases.

Fourth, that where proceedings have been instituted before the 31st of *December*, 1861 (viz., before the new law of limitation came into operation), to enforce a right under sect. 10, Reg. XIX. of 1793, in the ordinary Civil Courts, the law of limitation does not apply.

Fifth, that as sect. 10, Reg. XIX. of 1793, applies only to grants made since 1st of *December*, 1790, the *onus* of proving that the case falls within sect. 10, or, in other words, that the grant was made since 1st of *December*, 1790, and that the case is not affected by the law of limitation, rests with the Plaintiff. He must prove that the land held by the Defendant, and which the Defendant claims to be *Lakhiraj*, is part of the *Mal* land of the Plaintiff, and must show that it was assessed with the Public revenue at the time of the Decennial Settlement. If he proves this fact, it may be presumed that the rights under which the Defendant claims to hold as *Lakhiraj*, commenced subsequently to the 1st of *December*, 1790, unless the Defendant give satisfactory evidence to the contrary. If the Plaintiff fail to give the necessary proof, the issue as to limitation must be found for the Defendant.

Sixth, in cases Nos. 1,290 and 1,291 it was held by the Full Bench that a suit alleged to be brought under sect. 30, Reg. II. of 1819, must be assumed to refer only to a *Lakhiraj* created prior to the 1st *December*, 1790, and is necessarily not one to which the rule created by sect. 10, Reg. XIX. of 1793, of exemption from limitation, applies.

Seventh, that looking at the past practice of the Courts, and the peculiar circumstances under which the suits now before the Court have been brought, it was held, that if a Plaintiff have erred in stating that his suit is brought under sect. 30, Reg. II. of 1819, and wishes to amend his plaint, he may be allowed to do so by striking out the allegation that the suit is brought under sect. 30.

Eighth, that if the Plaintiff amend his plaint he must comply with the provisions of clause 3, sect. 26, Act, No. VIII. of 1859, by stating when his cause of action accrued, and if the cause of



No appearance was put in for the Respondents in either appeals, and they were consequently heard *ex parte*.

Sir *R. Palmer*, Q.C., and Mr. *Doyne*, for the Appellant in the first appeal,

Argued, first, that it was not contested in the suit, that the lands formed part of the Appellant's Decennially settled estate, and, secondly, that the burthen of proof of exemption from assessment was on the Respondents, the *Lakhirajdars*, and not the Appellant, the *Zemindar*.

action accrued beyond the period ordinarily allowed by any law for commencing such a suit, the ground upon which exemption from the law is claimed.

The above, therefore, are the rules as gathered from the decisions of the High Court in the cases of *Sonatum Ghose*, Appellant, No. 869, *Heeramonee Debya*, Appellant, No. 1,290, by which the Lower Courts should be guided for the future in disposing of resumption suits. In all cases now pending in the Courts below the parties should be allowed to amend their pleadings with reference to the above rules. We would further observe, that the cases referred to the Full Bench were instituted previous to the coming in operation of Act, No. XIV. of 1859. That law came into operation after the 31st of *December*, 1861. In all suits instituted subsequent to that date the effect of c. 14, sect. 1 of Act, No. XIV. of 1859, on the Plaintiff's suit must be taken into consideration.

We remand this case to the Lower Court to enable the Plaintiff to amend his plaint, if so minded, according to the rules laid down and we direct the Lower Court to replace the suit, after the amendment has been made, on its own file, and to proceed with it as if the plaint had originally been presented in its amended form. The Court will permit the Defendant to file a fresh answer, and also allow the parties sufficient time to bring forward any further evidence they may wish to adduce."

For the judgments of the Bench of seven Judges referred to, see 2 Weekly Reporter, pp. 91, 205.

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In the second appeal,

Mr. *Doyne*, who appeared for the Appellant,

Insisted, first, that the lands claimed by the Appellant as *mâl* were sufficiently proved to form part of the Decennially settled *Talook* of *Nusseerbattee*, and secondly, that the Respondents failed to get rid of the effect of such proofs by establishing, as to such land a *Lakhiraj* title of a date previous to *December*, 1790.

*Ben. Regs.* XIX. of 1793, sect. 10: II. of 1819, sect. 30; Act, No. X, of 1859, sect. 28; *Heeree Monee Dabee v. Koonj Baharee Holdar* (a), *Sonaton Ghose v. Moulvie Abdool Turrub* (b), and *Khelut Chunder Ghose v. Poorno Chunder Roy*, case No. 268 of 1864 (c), were referred to and commented upon.

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The consideration of the appeals having been reserved, their Lordships' judgment in both cases was now delivered by

The Right Hon. Sir WILLIAM COLVILE.

This appeal, and that of *Hurryhur Mookhopadhyas v. Madub Chunder Baboo*, were lately argued *ex parte* before this Committee. The principal question involved in them is common to both, but inasmuch as in each some subordinate point peculiar to it was also raised, their Lordships will deal with them separately. They propose to take first the appeal of *Nobokishto*, though the last argued, because that record contains a judgment pronounced on the 27th of *March*, 1865, in a third case, No. 268, of 1864, wherein the High Court stated fully the grounds upon which the ruling impugned by both these appeals is founded.

(a) 2 W. R. 207.      (b) 2 W. R. 205.      (c) Ante, p. 155.



This suit was instituted by the Appellant as a *Durputneedar*. Its object was to obtain a declaration that certain lands which the Respondents claimed to hold as *Lakhiraj* land were so held by them under an invalid title ; that they were the *māl* lands of the Appellant, liable, as such, to pay rent to him, and to have them assessed accordingly. The suit was originally brought before the Collector, but under the provisions of an Act of the *Bengal* Council, No. VII. of 1862, was afterwards transferred to the Principal *Sudder Ameen* of *Zillah Hooghly*. The plaint expressly stated, that the suit was brought under the 1st clause of section 30 of Regulation II. of 1819. Their Lordships need not consider particularly the provisions of that enactment. It is only material to observe, that in suits brought under it by a *Zeminder*, or one to whom the *Zemindar's* rights have been transferred, the whole burthen of proving the nature and commencement of his title was understood to be thrown upon the Defendant, the *Lakhirajdar*, whom the Plaintiff, who disputes the validity of the tenure, might compel to produce the *Sunnuds* and other ancient documents upon which such title rested. The sole proof of title which the Defendant could require, in the first instance, from the Plaintiff was that the lands in question were within the ambit of his *zemindary* or *putnee*, as the case might be. This issue the Respondents in the present case did raise, and successfully raise, as to part of the land. As to the rest of the land, the only issue, except that of limitation, was, whether it was the Respondents' valid rent-free land or not, the whole burthen of proof on this issue being cast on them.

The Principal *Sudder Ameen*, the Judge of the Court

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of First Instance, found that of the land in suit, 2 *beegahs* and 1 *cottah* were not within the Appellant's *putnee*; that as to 12 *beegahs* and  $14\frac{3}{4}$  *cottahs*, other part of that land, the Respondents had proved, by certain ancient documents, that they had held and enjoyed them as rent-free lands from long before the 1st of *December*, 1790, and that, consequently, the claim to assess them was barred by limitation. The residue, being 3 *beegahs*  $17\frac{3}{4}$  *cottahs*, he held liable to assessment. Both parties appealed against this decision to the *Zillah* Judge who, on the 21st of *June*, 1864, confirmed the decree of the Principal *Sudder Ameen*, so far as it related to the 2 *beegahs* and 1 *cottah*, but reversed it as to the rest of the land, making as to that a decree in favour of the Appellant's claim. The grounds of his decision were, that the documents produced by the Respondents were untrustworthy, and, therefore, that they had failed to prove either a valid title to hold the land rent-free, or that the land, having been held rent-free for a period commencing before the 1st of *December*, 1790, the Appellant's right to assess them was barred by limitation.

The Respondent then preferred a special appeal to the High Court. Of the grounds stated for the appeal it is only necessary to notice the third and the fourth. The third is, that the suit being brought, though improperly, under section 30, *Ben. Reg. II.* of 1819, was admittedly barred by limitation. The fourth, that the *onus probandi* had been improperly thrown upon the Defendants. On the 13th of *April*, 1865, the High Court remanded this suit, with five others, which it treated as being in the same category, to the Court of First Instance, stating only that "the *onus* having been misplaced, these cases must go back to



the First Court with reference to the principles laid down in case No. 268 of 1864."

Before considering the propriety of this remand, which is the principal question raised by the appeal, it will be convenient to complete the history of this particular case. The Appellant went again before the Principal *Sudder Ameen*, amending his plaint pursuant to the Order of remand by striking out all reference to the Reg. II. of 1819, and making it a plaint for the resumption of land fraudulently made *Lakhiraj* after the 1st of *December*, 1790, and, therefore, falling within the 10th section of Regulation XIX. of 1793. The Principal *Sudder Ameen* thereupon framed fresh issues, the first of them being, whether the land in dispute ever formed a portion of *mâl* land at the time of the Government settlement, and whether at any subsequent time it had been fraudulently made rent-free; and on the 13th of *September*, 1865, he dismissed the suit upon the ground, that the Plaintiff, the Appellant, had produced no documents or evidence in the suit, and had thereby failed to support the burthen of proof which this issue cast upon him. The Appellant afterwards, in *August*, 1865, obtained from the High Court a very special leave to appeal to Her Majesty in Council, on the ground that this suit, though the subject-matter of it was far below the appealable value, was one of a large class in which similar remands had been made. Their Lordships will assume that this leave to appeal was properly granted, and that the object of the appeal, or at least its principal object, is to test the correctness of the principle on which remands in this and similar cases have been directed, and the burthen

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of proof to some extent cast on the Plaintiff in suits of this nature.

In order to do this, it is necessary shortly to review the law relating to *Lakhiraj* tenures within the Provinces embraced by the Perpetual Settlement, and some recent decisions of the High Court of *Calcutta* concerning it.

The foundation of that law is well known to be Regulation XIX. of 1793. That Regulation, after affirming in the strongest terms the *primâ facie*, or, so to speak, Common law right of the ruling Power to a certain proportion of the produce of every *beegah*; after declaring all *Lakhiraj* tenures to be exceptional and in contravention of that right; that many of the existing tenures of that kind were invalid; but that all, whether valid or invalid, had been excluded from the Decennial Settlement; and that the *jumma* assessed upon the estates of individuals under that Settlement was to be considered as exclusive and independent of all *Lakhiraj* lands, whether exempted from the *Khiraj*, or public revenue, with or without due authority; proceeded thus to deal with the then subsisting *Lakhiraj* tenures. It divided them into two classes, viz., those created by Grants made previous to the 12th of *August*, 1765, the date of the Grant of the *Dewanny* to the *East India Company*, and those created by Grants made between that date and the 1st of *December*, 1790. The former by the second section were, subject to certain conditions, declared to be valid. The latter, with certain exceptions, and subject to certain conditions, were, by the third section, declared to be invalid; and as such, to be resumable and subject to



future assessment. The Regulation then went on to sub-divide the invalid and resumable tenures into two classes, viz., those which comprised lands not exceeding 100 *beegahs*, and those which comprised lands in excess of that quantity. The revenue which might thereafter be assessed on the former was declared to belong to the *Zemindar* or *Talookdar*, within whose estate the lands were situate. The revenue which might thereafter be assessed on lands falling within the latter class was declared to belong to the Government. And thus the power of bringing a resumption suit to impeach a *Lakhiraj* tenure existing at the date of the Decennial Settlement, and to have revenue or rent assessed thereon came to belong to the Government, or to private proprietors, according to the quantity of land comprised in such tenure. Having thus dealt with all the *Lakhiraj* tenures then subsisting, the Regulation proceeded to legislate against the future conversion of any rent-paying lands comprised in the Decennial Settlement into rent-free lands. This was done by the 10th section, which is in these terms :—

“All Grants for holding land exempt from the payment of revenue, whether exceeding or under 100 *beegahs*, that may have been made since the 1st of *December*, 1790, or that may be hereafter made, by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such Grant, either with regard to the property in the soil or the rents of it. And every person who now possesses, or may succeed to the proprietary right in any estate or dependent *Talook*, or who holds, or may hereafter hold, any estate or de-

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pendent *Talook*, in farm of Government, or of the proprietor, or any other person, and every Officer of Government appointed to make the collections from any estate or *Talook* held *khas*, is authorized and required to collect the rents from such lands at the rate of the *Pergunnah*, and to dispossess the Grantee of the proprietary right in the land, and to re-annex it to the estate or *Talook* in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of the dispossession or annexation to any Officer or Government; nor shall any such proprietor, Farmer, or dependent *Talookdar* be liable to an increase of assessment on account of such Grants, which he may resume and annul during the term of the engagements that he may be under for the payment of the revenue of such estate or *Talook* when the Grant may be so resumed and annulled. The Managers of the estates of disqualified proprietors, and of joint undivided estates are authorized and required to exercise, on behalf of the proprietors, the powers vested in proprietors by this section."

It is obvious that this enactment relates solely to lands which, on the 1st of *December*, 1790, were *mál* or rent-paying lands; that it treats the Grant of a rent-free tenure in such lands not as voidable, but as absolutely void; that it reserves to the Government no right in such lands unless they happened to be held *khas*; and that it positively declared, that no length of possession should give validity to any such Grant. It further expressly authorized the Landowner to dispossess the Grantee by the high hand, without having recourse to the machinery provided by other sections of the Regu-



lation for the resumption or a sssessment of resumable *Lakhiraj* tenures; or to any other legal proceeding.

The machinery provided for resumption suits by the Regulation of 1793 was modified by several subsequent Regulations, and in particular by the Regulation II. of 1819, which has been already mentioned. And in process of time Landowners seeking to enforce their rights under the 10th section of that Regulation seem to have found it expedient to do so by means of legal proceedings rather than in the summary manner authorized by that enactment. An important distinction was, however, established by judicial decisions between a suit to enforce a claim uuder this 10th section, and ordinary resumption suits, whether brought by Government or individual proprietors under the earlier sections of the Regulation. Whatever doubts may at one time have existed, it became unquestionable, after the decision of this Committee in the case of the *Maharajah of Burdwan* (4 Moore's Ind. App. Cases, 466), that the right of the Government to resume a voidable *Lakhiraj* tenure comprising more than 100 *beegahs* was subject to the sixty years' limitation; and that by parity of reasoning the right of a *Zemindar* to resume a voidable *Lakhiraj* tenure, comprising less than 100 *beegahs*, was subject to the twelve years' limitation. On the other hand, the Courts construing the Regulation of Limitation in connection with that part of sect. 10 of Regulation XIX. of 1793, which says, that no length of possession shall give validity to such a Grant, came (whether on sound principles or not it is immaterial here to consider) to the conclusion, that the claim of a Landowner under this section was

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subject to no limitation. Notwithstanding, however, these distinctions between the two rights, and between the suits to enforce them, a loose practice seems to have sprung up, under which Landowners claiming the right to assess lands held and enjoyed rent-free brought their suits generally under Regulation II. of 1819, without specifying whether they were seeking to enforce the right given to them by the 7th and 9th sections of Regulation XIX. of 1793, or that given to them by the 10th section. The result was that the stringent provisions of Regulation II. of 1819, and of the other Regulations *in pari materia*, were indiscriminately applied; and that in all cases the burthen was cast upon the Defendant of proving, by the production of ancient documents, that his tenure existed before the 1st of *December*, 1790. If he established this he would probably succeed, whether his ancient *Lakhiraj* tenure was voidable or not, the suit, unless the Plaintiff happened to be an auction Purchaser at a Government sale, being barred by limitation.

So stood the law and practice until Act, No. X. of 1859 was passed. The 28th section of that Act repealed so much of the 10th section of Regulation XIX. of 1793 as authorized the Landowner summarily to dispossess the Grantee of a rent-free tenure; it provided, that every Landowner who should desire to assess any such land, or to dispossess the Grantee should take proceedings before the Collector which were to be dealt with as a suit under that Act; and it fixed a period within which such suits were to be brought.

Between the passing of this Act and the beginning of the year 1865, the Courts of *Bengal* seem to have



been somewhat divided upon several questions touching the proper mode of enforcing the claims of *Zemindars* and other Landowners, under the 10th section of Regulation XIX. of 1793; and some, at least, of such questions were finally referred for adjudication by a full Bench, consisting of seven Judges of the High Court, in the appeal of *Sonatun Ghose v. Moulvie Abdool Turrub*. This case, which was numbered No. 869 of 1864, was decided on the 25th of *January*, 1865, and is reported in 2 Weekly Reporter, p. 91. The Judges were divided in opinion, each delivering a separate judgment, in which the law on the subject was elaborately reviewed. But the following was the final judgment of the Court. All the Judges held, that before the passing of Regulation II. of 1819 the Civil Courts under their ordinary jurisdiction were competent to entertain regular suits by *Zemindars* for the declaration of their rights to resume revenue illegally alienated subsequent to 1790, and for possession of the land held rent-free under grants or titles which had their origin subsequently to the 1st *December* in that year. Four of the Judges against three held, that such suits were unaffected by the passing of Regulation II. of 1819, section 30, of which the proper operation was limited to suits for the resumption of *Lakhiraj*, existing prior to the 1st of *December*, 1790. And four of the Judges against three held, that the jurisdiction of the ordinary Civil Courts to try the suit was not taken away or affected by the 28th section of Act, No. X. of 1859.

The second of these rulings is, that which is most material to the decision of the present appeal; the necessary consequence of it being that a suit to

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enforce a claim arising under the 10th section of Regulation XIX. of 1793, if brought under the 30th section of Regulation II. of 1819, in order to get the benefit of the procedure there prescribed, is improperly framed.

The same case came again before a full Bench of seven Judges, somewhat differently composed, on the 22nd of *February*, 1865. They unanimously held, that they were bound by the decision of the 25th of *January*, 1865, so far as it went. But they further decided, that the regular suit which, notwithstanding the 28th section of Act, No. X. of 1859, might still be brought to assess or resume invalid *Lakhiraj*, created since the 1st of *December*, 1790, was not subject to limitation; and further, that in every fresh suit it lay upon the Plaintiff to prove that the case was one falling within the 10th section of Reg. XIX. of 1793. And the Court added, "He must prove his allegation, that the land held by the Defendant, and which he claims to be *Lakhiraj*, is part of the *mâl* land of the Plaintiff. If he prove that fact, and show that it was assessed to the public revenue at the time of the Decennial Settlement, it may be presumed that the right under which the Defendant claims to hold as *Lakhiraj* commenced subsequently to the 1st of *December*, 1790, unless the Defendant gives satisfactory evidence to the contrary." In another case, *Sonatun Ghose v. Moulvie Abdool Turrub*, decided the same day by the same Judges (2 W. R. p. 207), they adhered to the rulings in No. 869 of 1864, to the effect, that section 30 of Reg. II. of 1819 related only to suits for resumption of *Lakhiraj* created prior to the 1st of *December*, 1790, and held that, as a consequence of that ruling, every



suit alleged to be brought under section 30 was necessarily not one to which the rule created by section 10, Reg. XIX. of 1793, of exemption from limitation, applies. They further decided, that the Plaintiff, having erred in stating that the suit was brought under section 30 of Reg. II. of 1819, should, if he wished to do so, be allowed to amend his plaint, and that, in such case, the cause should be remanded for re-trial; but that if the Plaintiff did amend his plaint, he must show on the face of it, as required by the Law of procedure, when his cause of action accrued, and if it accrued beyond the period ordinarily allowed by any law for commencing such a suit, upon what ground an exemption was claimed.

There has been, so far as their Lordships are aware, no appeal from these decisions of a full Bench of the High Court. They have since given the law to the Division Benches of that Court; and the Order of remand, of which the present appeal complains, is one of many which have been made in accordance with them. The judgment in the case of *Khelut Chunder Ghose v. Poorno Chunder Roy (a)*, No. 268 of 1864, is, in fact, only a recapitulation of what had been decided and laid down in one or other of the above-mentioned decisions of the full Bench.

No attempt was made at the Bar to impugn the correctness of the first decision in No. 869 of 1864. It must be held, therefore, to be settled law that the provisions of the 30th section of Reg. II. of 1819 do not apply to such a suit as the Appellant's, and the only questions which the appeal raises are whether, this being so, the High Court has been

(a) See case *ante*, note, p. 155.

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right in remanding this and other suits similarly circumstanced for re-trial; whether on such a re-trial the burthen of proof should be cast in the degree in which the High Court cast it on the Plaintiff; and lastly, whether there is anything in this particular case which renders such an order of remand, though otherwise correct, improper.

Their Lordships are very clearly of opinion, that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the Plaintiff, whose suit, if not so remanded, ought to have been dismissed. The invocation of the 30th section of Reg. II. of 1819 is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and presumptions prescribed by that enactment, and the enactments *in pari materia*, greatly to the advantage of the Plaintiff, and consequently to the prejudice of the Defendant. It follows that, if the procedure was not applicable to the case, there had been a mis-trial.

Again, their Lordships think that no just exception can be taken to the ruling of the High Courts touching the burthen of proof which in such case the Plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the Plaintiff to prove a *prima facie* case. His case is, that his *mâl* land has, since 1790, been converted into *Lakhiraj*. He is surely bound to give some evidence that his land was one *mâl*. The High Court, in the judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent



at some time since 1790, or by documentary or other proof that the land in question formed part of the *mál* assets of the estate at the Decennial Settlement. His *primâ facie* case once proved, the burthen of proof is shifted on the Defendant, who must make out that his tenure existed before *December, 1790.*

It may be objected that the result of this ruling may be that Plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the Plaintiff to give *primâ facie* proof of the fact which is the foundation of his title; a circumstance not likely to occur unless the Defendants, or those from whom they claim, have been long in possession of the tenure impeached. Nor is it, in their Lordships' opinion, to be regretted if, in such cases, effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations, which have now been decided to be inapplicable to suits of this nature, and relieving Defendants from a burthen which every year made it more difficult to suport.

The only other point to be decided on this appeal is, whether there is any peculiarity in this case which ought to take it out of the general rule. Their Lordships are of opinion, that there is not. Mr. *Doyne* argued that the Defendants had admitted that the lands in question, with the exception of the small quantity no longer claimed, were within the Appel-

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lant's estate. But such an admission is obviously not sufficient to meet the burthen of proof thrown upon the Plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been *mâl* lands. In fact, the Defendants strenuously asserted the contrary. The Appellant, therefore, having failed to give any evidence on the second trial in support of his amended plaint, the decree dismissing his suit was right.

In the other appeal, that of *Hurryhur Mookhopadhyas v. Madub Chunder Baboo* the suit was also, on the face of it, brought under section 30 of *Ben. Reg. II.* of 1819, though to enforce a claim under section 10 of *Reg. XIX.* of 1793. In fact, in this case there was a preliminary proceeding under the 28th section of Act, No. X. of 1859. The Defendants (the Respondents) undertook to prove that their tenures existed before *December, 1790*. The Principal *Sudder Ameen* decided on the 9th of *April, 1863*, that they had failed to do so and decreed in favour of the Appellant. That decree was affirmed on appeal by a Division branch of the High Court on the 14th of *March, 1864*. An application for a review of judgment was made on the 10th of *June, 1864*, on the ground, amongst others, that the Appellant having stated that the lands were his *mâl* lands, the Court had erred in throwing the *onus* of proof on the Defendants. The review was admitted on this ground; and on the 24th of *August, 1865*, the Court made an Order in these terms:—"A notice will issue to the other side, when the case will be argued, whether or no



our decision, which has been overruled by the subsequent ruling of the full Bench, should not be altered;" and on the 6th of *September*, 1867, the Court made the second Order for a remand, saying, "the *onus* being on the *Zemindar*, he will be permitted to amend his plaint; and he will have to prove that the land is *mál* by showing that he has received rent for the same."

Their Lordships conceive that, subject to the point which will be subsequently noticed, the question, whether this remand was correct must be governed by their decision on the other appeal. They do not think that the Order is vitiated by the specification of one amongst the various methods by which the Plaintiff might prove his case. They do not conceive that the High Court really meant to limit him to that kind of proof. It was, however, argued by Sir *Roundell Palmer* that the remand of this particular case was improper, because the suit had already been finally decided in the Appellant's favour, and ought not to have been admitted to a review, in order to give the Defendants the benefit of what had been decided in other cases after such final judgment had passed. Their Lordships, however, observed that the application for a review seems to have been regularly made within ninety days of the date of the decree sought to be reviewed, pursuant to sect. 377 of the Code of Procedure; and this being so, their Lordships conceive that it was competent to the High Court to delay, if they did delay, their final decision on that application until the law on which so much doubt existed had been settled by the judgments of the full Bench of the High Court, which have been already noticed.

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Therefore, in this case also, their Lordships think that the final Order of the High Court was correct. They will, accordingly, humbly advise Her Majesty to dismiss both appeals. As the Respondents have not appeared on either, it is unnecessary to say anything about costs.

KOOER GOOLAB SING, and others ... *Appellants*;

AND

RAO KURUN SING ... *Respondent.\**

*On appeal from the Sudder Dewanny Adawlut,  
Agra, North-West Provinces.*

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Lunacy by  
Hindoo Law  
is a bar to  
succession.

On the death  
of D., his  
Widow suc-  
ceeded, ac-  
cording to the *Mitācshārā*.

By Deeds of gift and sale she and her Husband's Mother alienated part of her Husband's estate. R., the fifth in descent from the common ancestor of D., whose Father was dead, brought a suit as Guardian of his Grandfather, a lunatic, against the alienees and D.'s Mother, the heir of D.'s Widow, then deceased, to set aside the alienations of the inheritance, and for possession. The Courts in India set aside the alienations as having been made without such necessity as is required by Hindoo Law. Such decree affirmed on appeal.

At the time of the institution of the suit D.'s Mother was alive:—Held, that R., as the next presumable reversioner, was entitled to sue to preserve the estate, and that it was not a fatal objection to the suit that she died before decree in a suit so framed, as it was only a matter of form, not affecting the merits.

Whether a Sister can succeed by inheritance her Brother, according to the law received in the North-West Provinces, *Quære?*

Such point not having been raised by the issues in the suit, the Judicial Committee refused to decide the question.

THIS appeal was brought from a decree of the late *Sudder Dewanny* Court of the *North-West*

Present :—Members of the *Judicial committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

Assessor :—The Right Hon. Sir Lawrence Peel.



*Provinces, Agra*, which affirmed a decision of the Court of the Principal *Sudder Ameen* of *Allyghur*, whereby possession of seventeen villages and other real property, in that District and *Bolundshahr*, was decreed to the Respondent.

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The circumstances which gave rise to the appeal were as follows :—

The property in question was the separate estate of *Rao Dhuleep Sing*, who inherited it from his Father, *Kooshal Sing*. The common ancestor of the family from whom the Respondent and the deceased *Rao Dhuleep Sing* descended was one *Oomed Sing*. He had three Sons, *Sewa Sing*, *Bulwunt Sing*, and *Hurnam Sing*. *Sewa Sing* died childless; *Bulwunt Sing* had two Sons, *Goolab Sing* and *Badam Sing*. *Goolab Sing* had a Son, *Inderjeet Sing*, the Father of the Respondent. *Badam Sing* died childless; *Hurnam Sing* had a Son, *Kooshal Sing*, who had a Son, *Rao Dhuleep Sing*, by his Wife, *Toolsa Kooer*, which Son, *Rao Dhuleep Sing*, was the Husband of *Koondun Kooer*. *Rao Dhuleep Sing* died childless in 1846.

On the demise of *Rao Dhuleep Sing*, his Widow, *Koondun Kooer*, and his Mother, *Toolsa Kooer*, were in default of his Sons, Grandsons, and Great-grandsons in the male line, registered as joint co-heirs of the deceased in the revenue department. On the 5th of *August*, 1856, *Koondun Kooer* conveyed by Deed of gift three villages to her Brother's Son, *Kooer Goolab Sing*, the first Appellant. In 1856, *Toolsa Kooer* conveyed by Deed of gift a village to her Husband's Sister's Son, *Doulut Sing*, the third Appellant, and her Nephew, *Buldeo Sing*, the second Appellant. After *Koondun Kooer's* death,



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in the year 1856, *Toolsa Kooer* and *Kooer Goolab Sing* were recognized as her heirs by the revenue authorities, and on the 31st of *January*, 1857, *Toolsa Kooer* and *Kooer Goolab Sing* executed an agreement by which *Toolsa Kooer* retained three of the villages, and *Kooer Goolab Sing* the remainder of his Aunt's landed property. On the 3rd of *June* and 22nd of *September*, 1859, *Kooer Goolab Sing* sold two of the villages to *Thakoor Chundun Sing*, the fourth Appellant, and on the 15th of *December*, 1860, *Toolsa Kooer* conveyed by Deed of gift the remainder of her portion of the estate to *Doulut Sing* and *Buldeo Sing*. On the 25th of *April* those parties sold a village to *Joogul Kishore*, who was made one of the Defendants in the original suit, but was not an Appellant in this appeal. *Toolsa Kooer* was also made another of the Defendants in the original suit.

In the year 1861, the Respondent filed a suit on his own account, and as Guardian and protector of *Rao Goolab Sing*, his Grandfather, a lunatic, against the Appellants and *Toolsa Kooer* and *Joogul Kishore*, to recover possession of the property alienated by *Koon-dun Kooer*, the Widow, and *Toolsa Kooer*, the Mother of *Rao Dhuleep Sing*. By this suit the Plaintiff sought to establish his title as nearest male heir in succession to *Rao Dhuleep Sing*, after his Mother's death, if he should survive her, and to recover possession of the lands alienated partly by Deeds of gift and partly by Deeds of sale. The points raised by the Defendants in their answers were, first, that the Plaintiff's claim was totally groundless, and was, moreover, barred by lapse of time.

Shortly after the institution of the suit, the Defendant, *Toolsa Kooer*, died.



The issues tried in the suit were, first, from what date the cause of action was to be reckoned, and whether the suit was barred by lapse of time? Second, whether the estate was a divided estate, and if so, had the Widow of *Rao Dhuleep Sing* power to alienate such divided property? Third, was the Plaintiff removed from the common ancestor by five generations, and if so, was the right of a member of the family so far removed from the ancestor to inherit by succession recognized by the *Shasturs*? Fourth, were the alienation made by *Koondun Kooer* to strangers valid *quoad* the Plaintiff? Fifth, with reference to the Plaintiff's statement that on the death of *Koondun Kooer*, *Kooer Goolab Sing* and *Toolsa Kooer* divided the property between them, under the authority of a Will alleged to have been left by *Koondun Kooer*; whether such Will was valid? A further issue was added, whether the Plaintiff, *Rao Kurun Sing*, could sue on behalf of his Grandfather, *Kooer Goolab Sing*, he not having obtained a certificate of administartion in respect of his Grandfather's interest, under Act, No. XXXV. of 1858?

The Court of First instance referred the points of law raised in the case to the Hindoo Law Officer of the *Agra Sudder* Court, who, by his answers to the interrogatories, gave it as his opinion, founded on the doctrines of the *Mitácshará*, first, that the Widow was the exclusive proprietor during her life; and, secondly that alienation by her to strangers, while any next of kin in a near or remote degree of relationship were living, was invalid; and, thirdly, that according to the *Shasturs*, relationship was not limited to a fixed number of generations, but that it was a maxim that a relation of a remote degree should not inherit while

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there was one of a nearer degree, as in the instances of a Father, Grandfather, and Great-grandfather, called "*Pind Bhagees*," and collateral to them the three "*Daip Bhagees*," and that these six persons were of that degree of kindred called "*Sapindas*," those relations who come next "*Sagoturs*," and the rule was, that while there are descendants of the Father, the descendants of the Grandfather were not entitled to inherit, and that the same rule held good among the "*Sagoturs*," as while there is a relation of the seventh degree, one of the eighth degree could not inherit. Fourthly, that the Widow could not convey away the property Deed of gift or Will, and was only entitled to maintenance out of the estate.

The Principal *Sudder Ameen* (*Rai Debidial*) pronounced judgment on the 21st of *November*, 1861, and ruled in accordance with this opinion on all the issues in favour of the Plaintiff, holding that the Widow was incompetent to alienate her Husband's estate, that the alienations were invalid, and that the Plaintiff, after her death, was entitled to succeed thereto as next heir, upon the authority of *Gunput Sing v. Ranee Chowbasee*, 29th of *July*, 1850, and *Ranee Roop Koor v. Rao Nuthoo Ram*, 13th of *August*, 1850, on the ground, that *Rao Goolab Singh* was the nearest next of kin of *Rao Dhuleep Sing*, but being disqualified by reason of lunacy, and his Son dead, the Plaintiff was entitled, in the absence of any nearer legal heir, to succeed as heir-al-law in succession to *Rao Dhuleep Sing*; and further held that the claim was not barred by limitation.

The Appellants appealed to the late *Sudder Dewanny Adawlut* at *Agra*, and filed their grounds or reasons of appeal, the substance of which is



referred to in the following judgment of the *Agra* Court.

The hearing of the appeal took place on the 22nd of *June*, 1863, before a Division Bench consisting of Messrs. *Edwards* and *Pearson*, two of the Judges of that Court.

The material part of the judgment of the Court was in these terms :—“ Of the grounds or reasons of appeal, the first, fifth, sixth, and seventh, which were either not advanced or not supported in the Court below, are not here seriously insisted on : the first is manifestly untenable. The provisions of Act, No. XXXV. of 1858, have not been applied in the case of *Rao Goolab Sing*, but his Grandson, as his nearest relation and natural Guardian, is not in consequence precluded from suing on his behalf, and still less from suing on his own behalf. As to the fifth, it is admitted that there is no proof on the records of *Rao Kurun Sing* having represented himself in any previous civil or revenue proceedings as the heir by adoption of his great-uncle, *Pudum Sing*. As to the sixth, it is obvious and sufficient to remark that the Plaintiff is free to dispute or redeem, as he may choose, the alleged mortgages, and that it was not incumbent on him to raise any questions about them in the present suit. It is not pretended that there is any proof on the record of the seventh plea. As regards the second, we entertain no doubt that the exposition of the Hindoo Law by which the Principal *Sudder Ameen* has been guided in his decision is correct. It coincides entirely with the view taken of the subject in *Macnaghten's Hindoo Law*, Vol. I. pp. 19, 20. The third plea, inasmuch as it is a reiteration of the allegation made in the Court below

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that the Plaintiff is too far removed in relationship from *Rao Dhuleep Sing* to inherit his estate, must be disallowed by us as it was by the Principal *Sudder Ameen*. Both the Plaintiff and his Grandfather are *Sapindas* of a near degree of relationship, and fully entitled to inherit in their turn. But it appears to us, looking to the order of succession according to the law current in these Provinces, indicated in pages 32 and 33 of the same volume of the above-mentioned work, that the Plaintiff was somewhat premature in claiming the property in suit before *Toolsa Kooer's* death. It is stated by *Macnaghten* that, after the Widow, in default of Daughters, the Mother ranks next in order of succession. After the latter, it is clear, in this case, that the succession devolved on the Plaintiff's Grandfather, and by reason of his present disqualification on himself. He may, therefore, have erred in asserting his cause of action to have arisen on the death of *Koondun Kooer*, and an objection on this score to his suit might have been urged by *Toolsa Kooer* who was alive when the suit was instituted and was impleaded in it by some plausibility. But it is to be remembered, that in fact, she had acquired only a small portion of *Rao Dhuleep Sing's* estate in succession of her Daughter-in-law, having previously obtained a larger portion thereof as a co-heir after her Son's death; and, moreover, she had partially relinquished her own right of inheritance by permitting *Kooer Goolab Sing* to inherit the remaining portion thereof as *Koondun Kooer's* heir. However, no such objection as might have been offered to the suit on the ground now noticed by us was made in the first instance, and if any such objection was in



effect, it was neutralized almost immediately after the institution of the suit, by *Toolsa Kooer's* death. Under the circumstances, it would not be conducive to any of the ends of justice if we were at this stage of the case to dismiss the claim as improperly brought, and to require the Plaintiff to sue afresh as next heir after *Toolsa Kooer*, instead of after *Koondun Kooer*, and we deem such a course to be altogether unnecessary. There remains only for consideration the fourth plea, which, in the terms in which it is put by the Appellants, will not bear a moment's scrutiny. *Rao Dhuleep Sing's* Widow and Mother having a prior right of inheritance as compared with that of the Plaintiff and his Grandfather, it follows, that the right of the latter had no actual existence during the lifetime of those two Ladies. It is absurd to contend that a suit which has been shown to have been instituted rather in anticipation of the proper time than otherwise, was brought so late as to be barred by the Limitation of suits Act. But although the claim for property could not have been brought at an earlier date, it is argued, that he was bound to have sued before for a declaration of the invalidity of the alienations which he now impugns. Such a suit might, perhaps, if brought by his Father in virtue of his contingent right and interest in the property, have been entertained, but we hold, that the cause of action afforded of those alienations more strictly and more urgently arose when the contingent became an actual right and interest. Furthermore, we observe that the suit which was instituted on the 4th of *May*, 1861, is quite within twelve years, reckoned even from the 22nd of *June*, 1849, the date of the *Ikrarnamah* by which *Rao Dhuleep Sing's*

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Widow accepted his Mother as co-sharer in the estate, and that all the other transfers impugned were subsequent to that date. Accordingly, we dismiss the appeal with costs.

The appeal was from this decree.

Sir *R. Palmer*, Q.C., and Mr. *T. Prichard*, for the Appellants.

We submit, first, that the Respondent was not entitled to sue on behalf of his Grandfather, or to succeed in the suit without establishing a title in himself, which he did not do; and, secondly, as between the parties to the suit, that the Respondent failed to show any title preferable to the title set up by the Appellants. By the Hindoo Law, where there is no Daughter or Daughter's Son, the Mother comes next in succession to the Widow. *Strange's Manual of Hindoo Law*, ch. xi. sect. 309. The line of nearer *Sapindas* stops with the Great-grandfather's Great-great-grandson. *Strange's Manual of Hindoo Law*, ch. xi. sect. 309; *Stoke's Hindoo Law*, p. 447, note *Menu*, ch. ix. 186; *Colebrooke's Dig.*, vol. ii. sect. 435, p. 568 [3rd Ed.], where kindred are enumerated. *Macnaghten's Hindoo Law*, p. 36 [5th Ed. by *H. H. Wilson*]. Sisters' Sons are included in the line of succession. *Mitácshará*, ch. ii. sect. v. par. 3; *Stoke's Hindoo Law*, p. 447, note, where it is shown that this is the opinion of the Indian Jurists, *Nanda Pandita*, *Balam-Bhatta*, *Kámalákara*, and the Author of the *Viyavahara Moyucha* (*Stoke*, p. 447), and is also so acknowledged in the untranslated text of the *Nirnáyasindhee* and the *Dharmasindhee*, where the Sister's Son is expressly mentioned in the list of those entitled to offer the



funeral cake. The passage in *Colebrooke* quoted by *Stoke* in note 1, p. 444, that "this opinion is controverted *Kamalākara* and the *Viyavahara Mayucha*," is not whether the Sister's Son does inherit or not, but which comes first, the Sister or Brother's Son; so that this opinion rests on the authority of the *Mitācshārā*, namely, of *Yajnyawalkya*, *Nanda Pindita Balam-Bhatta Kamalākara*, the *Viyavahara Mayucha* the *Nirnāyasindhee* and the *Dharmasindhee*. The Sanscrit dual comprises both masculine and feminine. The word translated "Brethren" means Sister as well as Brother just as "Fathers" or "Parents" include Mother. By many Commentators the Mother is held to be more nearly related than the Father; a Daughter's Son being admitted as heir in the School of Hindoo Law recognized in the North-Western Provinces to succeed, and on the same principle a Sister's Son is entitled to be admitted

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Secondly, Lunatics are excluded from inheritance by the *Mitācshārā*, ch. ii. sect. 10; *Dāya-Krama Sangraha*, ch. iii.; *Stoke's Hindoo Law*, pp. 455. 500; and the Respondent ought to have acted under the provisions of Act, No. XXXV. of 1858 sects. 8, 9, 10.

Thirdly, a Plaintiff can only succeed by proving his own title, which has not been done in this case, and not by the defect in the Defendant's title, *Ram Rutton Rae v. Furrook-oon-missa Begum* (a), *Jowala Buksh v. Dharum Sing* (b).

Mr. *Leith*, and Mr. *Thomas*, for the Respondent.

First the rule of succession by the Hindoo Law is laid

(a) 4 Moore's Ind. App. Cases, 233.

(b) 10 Moore's Ind. App. Cases, 511.



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down by *Macnaghten*, Prin. of Hindoo Law, pp. 32, 33, and, as stated in the judgment of the Court below, is the received interpretation of Hindoo Law, and the acknowledged rules acted on by Courts in *India*; therefore, the ingenious suggestion attempted by the Appellants to alter such received rules of succession cannot be entertained: it would subvert the admitted law. But even if the objection that the title of the Respondent was from *Rao Dhuleep Sing's* Mother was well founded, it could not be entertained now; such an objection was not taken in the Court below on the pleadings. By the Hindoo Law in force in the *North-Western Provinces*, the Widow, firstly, and on her death the Mother, secondly, of *Rao Dhuleep Sing* were his heirs in succession, each taking successively an estate in the property left by him determinable on death, and without any general powers of alienation beyond the term of their natural lives; therefore, the alienations sought by the suit to be set aside, so far as they purported to convey or absolutely assign an interest in the property beyond life estates, were invalid and inoperative by Hindoo Law as against the Respondent, who, at the death of the survivor of them, became the heir-at-law of *Rao Dhuleep Sing* in the place of *Rao Goolab Sing*, he being a lunatic and incapable of inheriting. The fact of his suing before *Rao Dhuleep Sing's* Mother's death did not affect his title to sue, which, as a presumptive reversioner to preserve the estate, he had a right to do. *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* (a). As in the case of an adopted Son, the estate of a Widow who adopts him becomes the property of the Son adopted, *Mussumat Soolukhna v. Ramdoolal Pandah* (b).

(a) 13 Moore's Ind. App. Cases, 209.

(b) 1 Rattigan's Sel. Cases in Hindoo Law, 8.



Secondly, the suit was not barred by the Regulations or Act of Limitation, as the right and title of the Respondent as heir-at-law to possession did not accrue until the survivor of *Toolsa Kooer*, the Mother of *Dhuleep Sing*, and the period of limitation calculated from the happening of that event had not arrived when the suit was instituted, and indeed before the expiration of twelve years from the date of the earliest of the alienations set aside by the Courts in *India*.

For judgment in this appeal, see joint judgment in the next case, p. 192.

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RAO KURUN SING ... Appellant :

AND

NAWAB MAHOMED FYZ ALI KHAN }  
 and others ... Respondents.\*

*On appeal from the Sudder Dewanny Adawlut,  
 North-Western Provinces Agra.*

THIS suit was instituted by the Appellant as heir-at-law of *Rao Dhuleep Sing*, and as Guardian of *Rao*

° Present :—Members of the *Judicial Committee*.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., the Right Hon. Lord Justice James, and the Hon. the Lord Justice Mellish.

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R. brought a suit against certain parties in possession and the tenant for life to set

aside the alienations made by the Widow of *D.* and her Mother-in-law, who, on the death of the Widow, was in possession as the Widow's heir. *R.* afterwards brought another suit against the Mortgagees in possession, claiming under the Widow to set aside the mortgage which formed part of the lands he sued for in the previous suit, as having been made



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*Goolab Sing*, his Grandfather, a lunatic, against the Respondents. The suit was brought to recover possession of the two *Mouzahs* of *Dohailee Bajgudhee* and *Madhogurh*, in *Talooka Burowlee*, which were in the possession of the Defendants under a mortgage Deed, and to set aside the mortgage, as being in excess of the legal powers of the Mortgagors to grant, and which deed was executed by *Toolsa Kooer*, the Mother, and *Koondun Kooer*, the Widow, both deceased, of *Dhuleep Sing*, who was the proprietor up to the time of his death of the *Mouzahs*, and whose Widow was his heir, as he had died childless; and, as such Widow and heir, she became solely entitled to the *Mouzahs*, and to the possession and enjoyment of the same during her natural life.

*Toolsa Kooer* survived her Daughter-in-law, on whose death she succeeded to the *Mouzahs*, as Mother and heir of *Dhuleep Sing*, and so became entitled solely to the possession and enjoyment thereof during the period of her natural life.

The questions arising in the appeal were as follows:—

First, as to the construction and application to the facts of this case of section 7 (a), Act, No. VIII.

(a) This section enacts that "every suit shall include the whole of the claim arising out of the cause of action, but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

by a Hindoo Widow, who, in the circumstances, had no power to charge the estate of her deceased Husband. Held, that the two suits being against different persons, of a distinct nature, and for different relief, sect. 7 of Act, No. VIII. of 1855, did not apply, as it was not a splitting suit or the same cause of action.

Held further, in the absence of proof showing the legal necessity, that the Widow had no power by Hindoo Law to charge or mortgage the estate of her deceased Husband so as to affect the inheritance.



of 1859; whether the omission by the Appellant of the claim made in the present suit from a former suit instituted by him against altogether different parties ought to be considered as bringing this suit within the provision contained in that section, so as to be affected by the bar thereby created, such former suit being instituted by him to establish his right of inheritance, in succession to *Rao Dhuleep Sing*, to certain *Mouzahs* which had belonged to the latter, including incidentally the two *Mouzahs*, the subject of the present suit, was also brought to set aside certain other and distinct alienations made by the Widow and Mother of *Rao Dhuleep Sing*, by other and distinct Deeds of sale and mortgage of other *Mouzahs* than those the subject of the present suit, and in favour of other parties as Vendees and Mortgagees from those mentioned in the Mortgage, the subject of the present suit.

Secondly, whether the circumstances justified the mortgage of the family estate by the Widow and her Mother-in-law.

By the decree of the Principal *Sudder Ameen* of the *Zillah* Court of *Allyghur* (*Moulvee Syud Ahmud Khan*), it was decided, with reference to the above questions, in favour of the Appellant. The judgment was as follows :—

“I am of opinion, that section 7, Act, No. VIII. of 1859, does not apply to the Plaintiff's claim. His former suit was brought by right of inheritance against the parties who considered themselves as heirs of *Koondun Kooer* and *Toolsa Kooer*, or as donees. The suit, therefore, required no decision in opposition to the Mortgagees of the property of *Koondun Kooer* and *Toolsa Kooer*, whilst the present claim is based on the ground that the aliena-

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tion made by them in the shape of mortgage is invalid under the Hindoo Law. It is quite a different claim, and bears on relation whatever to the previous one. Certainly the Plaintiff could have included these Defendants also in the former suit, and obtained a decision with regard to the cancelment of the disputed mortgage; but his not having done so does not warrant the relinquishment of his claim, as provided in sect. 7 of Act, No. VIII. of 1859. It is true, that the Plaintiff had in his former suit included the claim for the cancelment of several alienations other than the one now under consideration; but from this it does not follow that he admitted the alienation now in dispute. On the contrary, he never admitted it to be valid. In my opinion, the Plaintiff was even competent first to obtain a decree only for right of inheritance, and then to sue each transferee separately for the avoidance of the illegal transfer made in his favour, because a claim for inheritance is quite distinct from that for avoidance of transfers. In short, the Plaintiff not having included this claim in his former one does not preclude him from bringing this suit." The decree then went into the merits, and decided the suit in favour of the Appellant, setting aside the mortgage made by the parties under the circumstances in the plaint mentioned, and decreed possession of the two *Mouzahs* therein mentioned to the Appellant, as male heir in succession to *Rao Dhuleep Sing*.

Upon appeal to the late *Sudder Dewanny Adawlut*, at *Agra*, that Court took notice only of the plea, whether the suit was barred by section 7 of Act, No. VIII. of 1859; and the appeal having been referred to a full Bench composed of Messrs. *Roberts*



*Pearson, Spankie, and Turnbull*, it was decided (Mr. Justice *Pearson* dissenting) that the suit could not be maintained, and was barred by the 7th section of the above Act.

From this decree the present appeal was brought.

Mr. *Leith*, for the Appellant.

The claim of the Appellant in the former suit and the cause of action differed altogether from the claim and cause of action sought to be established in the present suit. The Defendants in the former suit were different parties, and separate from the Defendants in this suit; therefore, the non-joinder of the specific claim now sued for with the claim of heirship and possessor in the former suit ought not, on the true construction of sect. 7 of the Act, No. VIII. of 1859, to have been considered as a splitting suit, so as to create a bar by that section, and the *Sudder* Court was wrong in so construing that section.

Sir. *R. Palmer*, Q. C., and Mr. *Prichard*, for the Respondents.

The validity of the mortgage was admitted by one who claims to be a nearer heir than the Appellant to *Rao Dhuleep Sing*. The alienation of the villages by the Widows was valid by the Hindoo Law, *Cavalv Vencata Narrainapah v. The Collector of Masulipatam* (a), at all events, if the whole mortgage for Rs. 13,000 cannot be supported, yet it was good *pro tanto*, as it was advanced to the extent of Rs. 3,000 to save the estate from Government sale for arrears of revenue. The power of a Hindoo Widow to sell or mortgage her

(a) 11 More's Ind. App. Cases, 619.

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deceased Husband's estate, in such circumstances, is recognized in the Revenue, Civil and Criminal Cases (*Wyman*), No. 1,664, 10th January, 1867, *Full Chund Lall v. Rughoobind Sahaye*. This was clearly a splitting suit by sect. 7 of Act, No. VIII. of 1859, as the remedy now sought could have been obtained in the former suit by making the Mortgagees parties, and that section operates as a bar to this suit. *Agra High Court Reports*, No. 540 of 1867, p. 109.

Mr. *Leith*, in reply.

Their Lordships' judgment in both appeals was delivered by

The Right Hon. Sir JAMES COLVILE.

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Their Lordships, in delivering their judgment in these two cases, will begin with that which was first argued, namely the case of "*Kooer Goolab Sing v. Rao Kurun Sing*."

The Plaintiff in the suit and the Respondent in this appeal sued in the *Zillah* Court of *Allyghur*, in the *North-Western Provinces*, as heir of one *Rao Dhuleep Sing*, to set aside certain alienations of the immovable estate that had been *Rao Dhuleep Sing's* up to the time of his death, made by his Widow, who succeeded to the estate as his heir. The Defendants were respectively the persons claiming under these alienations and the Mother of *Rao Dhuleep Sing*, who had concurred in them. The Mother survived the Widow, and was intitled, at the death of the latter, to succeed as heiress to her Son, *Rao Dhuleep Sing*. The *Zillah* Court decreed the suit in favour of the Plaintiff. At the date of the decree the Mother was dead, but



she was alive at the time of the commencement of the suit.

The Plaintiff and *Rao Dhuleep Sing* descended from a common ancestor. The Plaintiff was fifth in degree, counting from that ancestor. In his line was his Grandfather, who still lived, but was a lunatic at the time of the institution of the suit, and at the time of *Rao Dhuleep Sing's* death. The Plaintiff's Father was then dead. On appeal to the late *Sudder Dewanny Adawlut* at *Agra*, that Court affirmed the decree. From that decision this appeal is now brought.

On the argument of the appeal, nothing was addressed to the Court on the facts to show that these alienations were valid, but the whole argument was addressed to the competency of the Plaintiff to question them. The learned Counsel for the Appellant objected, that at the time of the suit the Plaintiff was not entitled to the possession, and that the suit was one for possession, that he sued as Guardian of his Grandfather, and that he was not duly so constituted, and lastly, that he had shown no title as heir.

As to the first objection, the answer is, that this suit in its main object was brought to set aside certain alienations, and that as the nearest reversioner at the time when they took place was charged as concurring in them, the next presumable reversioner was entitled to question them, and the pendency of her life was not a fatal objection to the institution of the suit so far. And, as it appeared, that when the decree gave him possession, he was then entitled to possession, the objection on this point resolved itself into one of form, not affecting the real merits of the case.

As to the second objection, there are two answers

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to it ; first, that the Grandfather was not the heir, but the Plaintiff, and that if the latter had been obliged to sue on the Grandfather's title, the objection also would have been one of form, and not affecting the merits of the case. The objection to the Plaintiff's title as heir, which was taken in the Court below, on the ground of its remoteness from the common ancestor, was plainly untenable, and was not here insisted on. This objection, as taken below necessarily assumes the Plaintiff to be claiming as heir to the Son, and to urge on the hearing of the appeal for the first time, that the real title of heirship must be derived from the Mother, and not from the Son, was to start a new ground of objection to title, which the Plaintiff had had no opportunity of meeting in the Court below. The same objection also applied to the argument which was addressed to their Lordships, that a Sister may inherit to a Brother, and that that line of descent through the assumed Sister from the Brother was not exhausted by the Plaintiff's proof. To admit such a line of argument would be also to expose the Plaintiff to objections which, had they been raised below, might have been answered from what was known to be the law of the District, and by the want of proof that the person claiming to be the Son of a Sister, did in fact, stand in that relation to the *Præpositus*. It will be found from the judgment of the *Sudder* Court, that what the Court understood to be the questions raised, before them, and the sole issues raised, were, first, "Should the Plaintiff's cause of action be held to have arisen on the death of *Rao Dhuleep Sing* or of *Koondon Kooer*, and is the suit within time or not ? Second, Was *Koondon Kooer* competent or



not to alienate the property in question? Third, Is the Plaintiff so nearly related as to be entitled to inherit?"

Again, the argument at the Bar that the Plaintiff was not the heir, but that the person who appears in the pedigree, and who was a Defendant on the Record, was a nearer heir of *Rao Dhuleep Sing*, depends first upon proof that *Rao Dhuleep Sing* was the Sister's Son, and next, of course, upon the point of law whether the Sister's Son is capable of inheriting. That it is by no means clear that *Rao Dhuleep Sing* was the Sister's Son, would appear from the statement which precedes that judgment of the *Sudder Court*, in which the Judges say that "in 1856 *Mussumat Toolsa*," that is the Mother, "is said to have likewise executed a *Hibbanamih*, bestowing *Mouzah Mohood Khera* on her Husband's Sister's Son, *Doolut*, and her own Nephew, *Buldeo*," there treating *Doolut* not as the Sister's Son, but, in fact, as the Aunt's Son. There was, therefore, no real proof before the Court of the relationship of this party to the *præpositus*, and if there had been such a proof, then, inasmuch as the point was not taken in the Court below, there was nothing whatever to show that the law would not have been as it is contended to be, namely, that that person was not entitled, under the law of the *Mitácshára*, to inherit. There was nothing to show that the interpretation of the ancient text of the law on which Mr. *Prichard* relied, even assuming the relationship to be made out, did obtain in the *North-West Provinces*, and there is every reason to suppose from what has taken place in this case, that it has not been received there. The silence of the Defendant, supposing him to be in that degree of relation-

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ship which it asserted he was, and of the Court on this point, would be inexplicable on any other hypothesis. Moreover, it is clear that the Sister and her descendants find no place in the tables of succession, according to the law of the *Mitácshará*, which have been framed by several persons of authority, and in particular by that eminent Hindoo lawyer, the late *Prossonno Coomar Tagore*. The learned Counsel for the Appellant seemed indeed to concede this, and to admit that the exclusion did prevail in fact; but he contended, that it had its origin in error, and pleaded for a return to what he contended was the correct interpretation of the texts, founding himself chiefly on the authority of *Balam-Bhatta*. But it is entirely opposed to the spirit of the Hindoo customs to allow the words of the law to control its long received interpretation, as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the Country, and it seems to their Lordships that it would be extremely mischievous to disturb upon points taken here for the first time any such course of decision.

Their Lordships, therefore, see no ground whatever for disturbing the decisions of the Courts below in this case, and will humbly advise Her Majesty to dismiss the appeal with costs.

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In the other case two questions were raised; the first upon the decree of the High Court, which dismissed the suit of the Plaintiff, the Appellant, in this case, upon the ground that the case fell within the 7th section of the Act, No. VIII. of 1859, which says that "every suit shall include the whole of the claim arising out of the cause of action, but a Plain-



tiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

Their Lordships think that the true test of the proper application of this section to any particular case must be, whether there has been a splitting of the cause of action; and it is, therefore, necessary to consider what in each of these two suits was the cause of action, and whether the second suit can be said to have been brought upon a splitting of that cause of action.

Now, the first suit, as has already been shown, was brought against various Defendants to impeach certain alienations made by the Widow and Mother of *Rao Dhuleep Sing*. They were alienations by which the inheritance, subject to the interests of those persons, was transferred to certain foster-sons, or near relations, or dependents of the two Ladies so as to exclude the remoter heirs. The suit with which their Lordships are now dealing was brought to set aside a mortgage which had been granted by those Ladies to the Respondent's ancestor in this case before the alienations which were the subject of the other suit. It no doubt appears in the description of the property, which was the subject of the first suit, that three of the villages forming part of that property were subject to the mortgage now in question, and the name of the Mortgagee is mentioned. But it appears to their Lordships that the causes of action in the two cases were essentially different; in the one case the Widow and Mother, assuming an absolute power of disposition, had granted the inheritance in portions of the estate to the Defendants in the first

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suit. In the other case, the issue was, whether they had duly exercised the limited power which belongs to a Hindoo female having a Hindoo female's right of inheritance in the estate, of charging the estate for certain defined purposes.

The only ground upon which it can be plausibly contended, that these two claims against distinct persons and of a very distinct nature really form part of one cause of action, is founded upon the circumstance that in the first suit the Defendant sued for the possession of the lands, the argument being that the Mortgagees being parties then in possession, the suit for possession of the lands ought to have contained a prayer for setting aside the mortgages. It is, however, to be observed that the suit, though in form a suit for the possession, was not properly brought, and could not properly be brought, at the time it was first instituted for that purpose. The prayer for possession was, if things had remained as they were when the suit was first instituted, one which could not have been granted. But the substance of the suit really was, as has been stated in the judgment delivered in the other appeal; to have those alienations of the inheritance, which, if not impeached, would have been fatal to the claim of the Plaintiff as reversionary heir, set aside and declared invalid. That object was, as their Lordships think, perfectly distinct from that which is the object of the present suit, which is to have these mortgages declared invalid, as against the person who has in the former suit established his title to the possession of the estate as heir, on the ground that they were securities, which those who granted them had not the power to grant as incumbrances upon the inheritance.

That being so, their Lordships have next to con-



sider whether, the decree of the *Sudder* Court being incorrect upon the sole point on which it proceeded, there are sufficient grounds before them for affirming the decree of the Principal *Sudder Ameen*.

The case made is that this mortgage was granted by the Widow and Mother, and that it was not within the power of a Hindoo Widow to grant it, the money not being raised for any of those purposes for which the Widow is allowed to pledge the estate. In such a case, whatever be the precise degree of proof required from those who rely upon the mortgage, there is no doubt that those who take such a security from a person, having only a limited power to grant it, are bound to show, *prima facie* at least, that the money was raised for a legitimate purpose. The Defendants plead that "The real circumstances of the case stand thus:—*Mussumat Koondun Kooer* and *Toolsa Kooer*, the heirs in possession of the entire property left by *Rao Dhuleep Sing*, borrowed Rs. 13,000 from our ancestor, under the necessity of liquidating the debt due from the deceased, and that incurred on account of his funeral ceremonies performed for the benefit of his soul, and in lieu of this sum they mortgaged the three villages in dispute to him, and thus saved the property." Upon that pleading it is to be remarked, that no distinction is made between any of the items making up the Rs. 13,000, that the Defendants pledged themselves to the borrowing of the whole sum for the purposes therein mentioned, and that in those purposes it is not very distinctly stated, that any part of the mortgage money was borrowed for the purpose of saving the estate by paying an arrear of Government revenue. The case made at the Bar to-day, however, is that the mortgage is at all events partially good, inasmuch as Rs. 3,000, part of the

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claim was unquestionably borrowed for the purpose of saving the estate from a Government sale.

In all these cases it is to be expected, that those who have to support the affirmative of such a case, should give some clear testimony by Witnesses as to the nature of the transaction; and it is very remarkable that in this case the oral testimony on the part of the Plaintiff is so entirely worthless that neither of the learned Counsel for the Appellant thought fit to refer to it. That some evidence as to the nature of the transaction might have been given one would have supposed, because although the Respondents are the children or remoter descendants of the original Mortgagee, still, in those proceedings which have been relied upon as showing what the nature of the transaction was, and in particular as to the alleged Bond for Rs. 3,000, it is stated that it was taken in the name of *Kullyan Doss*, Cashier of the Respondent's ancestor. *Kullyan Doss* is not proved to be dead, nor is the absence of his testimony at all accounted for. There is really no evidence from any trustworthy person whatever employed in the family of the Defendants, as to what the real transaction was. In lieu of that, we are referred to the various proceedings which have been read and relied upon by Sir *Roundell Palmer*. But what is the documentary evidence, if evidence it can be called, as to the Rs. 3,000, which is in fact the only item on which any substantial question seems to arise? It is to be found in a plaint filed in a suit brought by the Mortgagee against the Widow and the Mother of *Rao Dhulcep Sing*, seeking to be maintained in possession as Mortgagee. The account that it gives of the transaction is this:—"The Plaintiff files a regular suit in this Court against *Mus-*



*sumat Toolsa Kooer*, the Mother, and *Koondun Kooer*, the Widow of *Rao Dhuleep Sing*, the proprietors of *Pergunnah Burowlee*, to be maintained in possession as Mortgagee, by insertion of his name as such in the revenue records of this District, and by allowing him to pay the Government revenue in respect of *Mousah Fusulpoor*, in *Pergunnah Burowlee*, assessed at Rs. 505, and to recover Rs. 328, the interest up to the end of the month of *Jeith*, 1254 *Fusly*, as well as Rs. 242, the mesne profits for the rainy season crop for 1255 *Fusly*, which the Defendant has forcibly realized from the lessees of the village, notwithstanding her having already given up its possession to the Plaintiff, according to the terms of the registered deed of mortgage, dated the 30th of *July*, 1846, engrossed on stamp paper, which is the basis of this action. Total value of suit, Rs. 1,076. He founds his claim on the assertion that on the demise of *Rao Dhuleep Sing*, the proprietor of the *Talook* of *Burowlee*, the aforesaid Defendants became his heirs; and as Owners of the entire *Talook* and all other property left by him, and in the certificates of death filed in the revenue department in respect to every one of the villages forming the *zemindary* of the deceased, the names of the Ladies were entered as his successors." That mutation of names took place, as is shown by the proceeding of that date, on the 22nd of *February*, 1847; and on the face of the proceeding as well as by evidence which has been given in the cause, it appears that the proceeding was one which followed upon certain litigation between the Widow, who was the immediate heir according to the Hindoo law, and the Mother, who contested her title, which at last ended in a compromise, whereby one took two-thirds and the

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other one-third of the estate. This plaint goes on to state:—"They then, for the payment of the Government revenue, asked the Plaintiff for a loan, and, according to their request, he lent them Rs. 3,000." Certainly the inference one would draw from this statement is that the loan was a joint transaction, that it was subsequent in date to the determination of the litigation by the compromise, and the insertion of the names of the two Ladies, as the registered Owners of the *Talook*.

Then, again, this Deed which is said to have been executed by them, and to have been registered on the 3rd of *August*, 1846, which is a date not quite reconcilable with what has just been said, or with what one would infer, is not produced. Neither that nor the mortgage Deed for Rs. 13,000 has been produced. And their Lordships, looking at this documentary evidence on which the Respondents rely, and contrasting it with the account given by the Witnesses for the Appellant, think that the case deposed to by the Witnesses for the Appellant, to whom credit was given by the Principal *Sudder Ameen*, is far more likely than anything which has been alleged on the other side, to be a true account of the real transaction. They are clearly of opinion, that the Respondents have failed to support that burden of proof which the law casts upon them, of showing that the mortgage was given in any part for the purposes, for which the Widow was entitled to pledge the estate.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal be allowed, that the decree of the High Court be reversed, and that in lieu thereof a decree be made dismissing the appeal to the *Sudder* Court and affirming the decree of the



*Zillah* Court, with costs. The Appellant in this suit, and the Respondent in the other suit, must have the costs of both the appeals.

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MOONSHEE AMEER ALI ... *Appellant* ;

AND

MAHARANEE INDERJEET SINGH, BA-  
 BOO RAMKISHEN SINGH, RENAE AS-  
 MODHEE KOOER, RANEE SOONETH  
 KOOER, RUN BAHADOOR SINGH } *Respondents.\**  
 MOODEYDHUR SINGH, LALL  
 NARAIN SINGH and DEOPUTTEE  
 NARAIN SINGH ...

*On appeal from the High Court of Judicature,  
 at Fort William, Bengal.*

IN this appeal the suit was brought in the Court of the Civil Judge of *Zillah Behar* by *Baboo Bischen Singh*, *Baboo Lall Narain Singh* and *Baboo Deoputtee Narain Singh* and the Appellant, the first three parties claiming to be entitled as heirs to the estates belonging to the *Tickaree Raj*. The Appellant

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

made from the decree. Notwithstanding such undertaking, an appeal was brought to *England*. The High Court certified in the record the undertaking. Held, by the Judicial Committee, on a preliminary objection being taken to the hearing, on the ground of the incompetency of the appeal, that such undertaking precluded an appeal.

As the Respondents had not applied in the first instance to dismiss on that ground, but had allowed the case to proceed to the hearing of the appeal, costs *nomine expensarum* only, were allowed.

15th July,  
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 The High  
 Court at Cal-  
 cutta, at the  
 instance of  
 the Appel-  
 lant's Counsel,  
 agreed to con-  
 fine the deci-  
 sion of that  
 Court to one  
 point, with an  
 undertaking  
 that no ap-  
 peal to Her  
 Majesty in  
 Council  
 should be



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claimed as Purchaser of one-eighth portion of the rights of the other Plaintiffs in the property in suit.

The suit purported to be instituted under a *Vakeelletnamah* appointing a Pleader by virtue of a *Mookternamah*, or power of Attorney, alleged to have been executed by the first Plaintiff, *Baboo Bischen Singh*.

The main question was, whether *Baboo Bischen Singh*, whose name appeared as the first Plaintiff in the suit, had executed the power of Attorney under which the suit had been instituted in his name. The other points raised were, whether he and his co-Plaintiffs *Lall Narain* and *Deoputtee Narain Singh* were heirs in reversion to the last *Rajah* of *Tickaree*, whose Widows three of the Respondents were, and as to *Ranee Sooneth Koour*, whether her deceased Husband had given her power to adopt a Son.

Mr. R. J. Richardson, the Judge of *Behar*, held that the *Mookternamah* was sufficient authority for the institution of the suit, on the ground that although that instrument was not attested by *Baboo Bischen Singh* in person, yet by virtue of his Son having verified the plaint, it was *primâ facie* genuine and valid, but he held that the Plaintiffs, *Baboo Bischen Singh*, *Lall Narain Singh*, and *Deoputtee Narain Singh*, had not proved their heirship, and dismissed the suit.

On an appeal to the High Court in the name of *Baboo Bischen Singh* and the other Plaintiffs from this decree, a preliminary objection was taken by the Respondents that there was no proof of the *Mookternamah* alleged to have been executed by *Baboo Bischen Singh*, either to institute the suit or to prefer the appeal, and the High Court adjourned



the appeal to enable that fact to be proved, and on the case coming again before the Court, the Counsel for the Appellant, in the presence of and with the approval of the Son of the Appellant, who was acting for him in the conduct of the appeal before the High Court, stated that if the Court would confine the judgment to the validity of the *Mookternamah* alone, the Appellant would undertake not to appeal from the Court's judgment to Her Majesty in Council.


On the 12th of June, 1866, the High Court, consisting of the Chief Justice, Sir *Barnes Peacock*, and Justices *Bayley* and *Jackson* gave judgment in the appeal reversing the decree of the Judge of *Behar*, holding that the *Mookternamah* was a fabrication document.

From this decision notwithstanding the Appellant's undertaking, he appealed to Her Majesty in Council. The other Plaintiffs refused to join in the appeal. With the transcript of the record, the High Court forwarded a certificate, to the effect, that in deciding the appeal, the question was limited to the validity of the *Mookternamah*, and that decision was made on the understanding that it was to be final, and the Appellant was not to appeal to Her Majesty in Council.


On the appeal being called on :—

Sir *R. palmer*, Q.C., and Mr. *Doyne*, for the first three Respondents,

Objected to the *locus standi* of the Appellant, and the competency of the appeal, as the Appellant's Counsel had given an undertaking in the High Court which precluded the Appellant from appealing to Her Majesty in Council upon the only ground he

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asked the decision of the Judicial Committee, such appeal being contrary to good faith and the undertaking of the Appellant's Counsel.

Mr. J. D. Bell, for the Respondent, *Ranee Asmodhee Kooer*, in the same interest.

Mr. Leith for the Appellant,

Insisted on his right to appeal, which he submitted was not shut out by the undertaking by Counsel in *India* as on the merits the Appellant's interest as Purchaser had not been determined.

The Right Hon. Lord Justice JAMES :—

Their Lordships are of opinion, that the preliminary objection taken to the hearing of this appeal ought to prevail. The certificate of the High Court of *Fort William* in *Bengal* is to the effect, that in consideration of the Court deciding the appeal before them upon one point only, that is, the validity of the *Mookternamah*, the Counsel for the Appellant, in the presence and with the consent of the Son and Agent of the Appellant, stated to the Court that he would not appeal from the decision as to the validity of the *Mookternamah*. Their Lordships, upon consideration, find that there was really very good and sufficient consideration for such an agreement on the part of Counsel, as part of the conduct of the case, because the result was this, and a very important result to the parties, that by obtaining the decision upon the validity of the *Mookternamah* alone, the case became a case not decided against *Baboo Bischen Singh*, the party in whose right the Appellant was suing. If the cases had been



heard by the High Court, and upon appeal the merits had been gone into, and the whole matter determined soon as in a suit by *Baboo Bischen Singh* and others, *Baboo Bischen Singh* and the persons claiming under him would not have been precluded from appealing to this Court, but might, on the other hand, have had two successive decisions against them upon questions of fact going to the merits of the case. But confining it to the decision upon the *Mookternamah*, it was really substituting a nonsuit for an adverse verdict, leaving it open to *Baboo Bischen Singh* and the Appellant himself, if he can get a new and genuine document in his favour, to bring a fresh suit. That being so, it was clearly a valid agreement on the part of Counsel not to appeal, and there is no doubt that it was done with the actual consent of the Son and representative of the Appellant. The appeal is brought in violation of good faith, and their Lordships feel that they ought not to entertain an appeal so brought where the real merits of the case have been withdrawn from the Court below.

But their Lordships have had some difficulty in determining what should be done with regard to costs. Now, their Lordships feel that where a certificate of this kind comes over with the record, and must, therefore, be known to both parties, it was the duty of each party to have made an application to the Registrar, who would at once have brought the matter to the attention of their Lordships, and taken their Lordships' directions as to what ought to be done with a record so constituted before any expense had been incurred in preparing cases, or in delivering Briefs for the hearing. It was wrong of both parties to proceed with an expensive litigation in the face of

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this certificate without its being brought, either through the Registrar or by an application at their Lordships' Bar, to their attention. Disposing of it upon this preliminary, but still very serious, objection, their Lordships feel that they ought not to give all the costs as if the case had been fully heard upon the appeal, but still they think the Appellant ought not to escape a very considerable portion of the costs which have been incurred. They think, therefore, that this is a case in which they may use the power with which they are invested to give a sum of money *nomine expensarum*, and, therefore, they will humbly recommend Her Majesty to dismiss the appeal, allowing to each of the three Respondents the sum of fifty guineas for the costs of the dismissal of the appeal.

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# CASES

IN

## THE PRIVY COUNCIL

ON APPEAL FROM

### THE EAST INDIES.

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ALBERT BIRMINGHAM MILLER, Official Assignee of the Court for the relief of Insolvent Debtor at Calcutta                   ...                   ...	}	<i>Appellant;</i>
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AND

THOMAS BARLOW                   ...	...	<i>Respondent.*</i>
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*On appeal from the High Court of Judicature at Calcutta.*

THE question involved in this appeal respected the right of the Appellant to the proceeds of goods bought by the Respondent at *Manchester*, and

12th & 13th  
July, 1871.

°Present:—Sir James William Covile, Sir Robert Phillimore (Judge of the High Court of Admiralty), Sir Joseph Napier, Bart., the Lord Justice James, and the Lord Justice Mellish.

A Firm, though Insolvent, may part with or put an end to a current speculation, the result of

which is still uncertain, on the best terms procurable, without any imputation of fraud; so also, the abandonment of a speculation whilst the result is uncertain may be both honest and politic, as it entirely differs from undue preference of one Creditor to others after a debt has been incurred.

Proceedings were taken under the Indian Insolvent Act, 11th & 12th Vict. c. 21, and the proceeds of certain goods claimed by the Official Assignee, paid by the Assignee into the Bank of *Bengal*. In a suit brought in the High Court at *Calcutta*, by A. against the Official Assignee, claiming the proceeds of the goods paid into the insolvent Court:—Held, on the Court making a decree in favour of the Plaintiff, that the High Court, being a Court of Law and Equity, had power to award interest on the amount, as against the Official Assignee.

A cause was heard before a single Judge of the High Court, and a



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shipped through the firm of *Small & Co.* in *London*, to *Balfour & Co.* at *Calcutta*, for sale under an agreement between, these parties. The proceeds of the sale were claimed as against the Respondent by *Cochrane*, the former Official Assignee of the Court of insolvent Debtors at *Calcutta*, of one *James Hamilton Robinson*, an Insolvent, who was one of the partners, and, at the time of the transaction hereinafter mentioned, the resident Partner at *Calcutta* of the Firm of *Balfour & Co.*, the Consignees, for sale.

The suit was instituted by the Respondent against *Cochrane*, as the Official Assignee of the estate of *Lewis Balfour*, senior, and *James Hamilton Robinson*, two of the partners in the Firm of Messrs. *Balfour & Co.* The Firm of *Balfour & Co.* consisted of *Lewis Balfour*, senior, *James Hamilton Robinson* and *Lewis Balfour* the younger. At the time of presenting the petition of insolvency, on the 17th of *February*, 1867, by *James Hamilton Robinson*, the other two Partners were in *England*.

The Firm of *Balfour & Co.* carried on trade as Merchants in *Calcutta* for many years, and the Firm of *Small & Co.*, in *London*, was the corresponding House in *England*, with whom the Firm of *Balfour & Co.* had been connected in business for many years. Various shipments were made, from time to time, by the Firm of *Small & Co.* to the Firm of

decree made by him dismissing the suit. An appeal was made to the same Court in its appellate jurisdiction before two Judges. The Court was divided in opinion; the Chief Justice holding that the judgment should be reversed, and the Puisne Judge that it ought to be affirmed and, under the 36th section of the Letters Patent of 1865, creating the High Court, a decree of reversal was ordered. On appeal, the Judicial Committee, without expressing any opinion whether the 36th section was applicable, having regard to the 26th rule of the High Court, directed the appeal to be heard on the merits.



*Balfour & Co.*, not merely on account of the Firms of *Balfour & Co.* and *Small & Co.*, but on account of others in connection with the two Firms. In the year 1862 an agreement in respect of the purchase and shipment of goods to *Calcutta* was entered into between the Firms of *Balfour & Co.*, *Small & Co.*, and *Bolton & Barlow*, Merchants, of *Manchester*, the effect of which was, that such goods as *Small & Co.* and *John S. Bolton & Barlow* should deem advisable should be bought by *John S. Bolton & Barlow*, and *John S. Bolton & Barlow* should charge no commission for buying and examining the goods, but to charge only for packing and making up the goods. *Small & Co.* were to effect marine insurance, charging no commission. *John S. Bolton & Barlow* were to draw at six months on *Small & Co.* for costs of goods, including packing charges. The Bills were to be discounted by *Overend, Gurney & Co.* at  $1\frac{1}{2}$  per cent. in excess of Bank minimum rate, *Balfour & Co.* to remit their three months' or six months' drafts, as might appear most desirable, on *Small & Co.*, in favour of *John S. Bolton & Barlow*, which *Overend, Gurney & Co.* agreed to take at  $1\frac{1}{2}$  per cent. above Bank minimum rate for three months, and  $1\frac{1}{2}$  per cent. for six months, as provision for said six months' drafts. And it was further provided, that *Balfour & Co.*, on sale of goods, were specially to remit proceeds to *Overend, Gurney & Co.* in first-class Bills drawn in favour of *Overend, Gurney & Co.* and *Overend, Gurney & Co.* agreeing to give up *Balfour & Co.*'s drafts on *Small & Co.* on receipt of remittances under rebate, *Balfour & Co.* to charge no commission for settling or guaranteeing sales, merely charging actual disbursements incurred.

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In the event of *Small & Co.* being under cash advances, *John S. Bolton & Barlow* agreed to find cash for one-third the amount. Under the agreement the three several Firms were jointly interested as Partners in the profit or loss arising on such shipments.

In pursuance of this agreement, goods were, from time to time, purchased by the Firm of *John S. Bolton & Barlow*, and shipped to the Firm of *Balfour & Co.* in *Calcutta*, until some time in 1863, when *John S. Bolton* retired from the Firm of *John S. Bolton & Barlow*, which thenceforward was carried on under the style of *Thomas Barlow & Brother*. After the retirement of *John S. Bolton* the agreement was adhered to and adopted in all respects by *Thomas Barlow* and the Firms of *Balfour & Co.* and *Small & Co.*, and various shipments were made to *Balfour & Co.*, on triplicate account for a series of years, except that *John S. Bolton* had no interest therein. After the failure of *Overend, Gurney & Co.* the remittances were made to the Firm of *Small & Co.* by the Firm of *Balfour & Co.*

In the months of *September, October, and November, 1866*, *Thomas Barlow* purchased and shipped, in terms of the original agreement, certain goods to Messrs. *Balfour & Co.* The goods so shipped arrived in *Calcutta*, Bills of lading duly indorsed of the same having been previously received by the Firm of *Balfour & Co.* at *Calcutta*, and which Bills so duly indorsed came to the possession of *James Hamilton Robinson*, the only Partner of the Firm of *Balfour & Co.* then residing at *Calcutta*.

In *December, 1866*, or, at latest, on the 1st of



January, 1867, an agreement was come to between the Respondent and *Small & Co.* and *Balfour & Co.* whereby in consideration of the Plaintiff taking upon himself solely all the risk and responsibility attaching to the shipments (which had not then arrived in *India*), and discharging *Small & Co.* and *Balfour & Co.* from all liability to pay any losses which might accrue thereon, those Firms respectively transferred, assigned, and made over to the Respondent all their respective right, title, and interest in the said shipments. This agreement was reduced to writing in the form of a Letter from the Respondent's Firm to *Balfour & Co., Calcutta*, and signed by the Respondent for *Thomas Barlow & Brother*, by *Small & Co.* and by *Lewis Balfour* the elder for *Balfour & Co.*

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The Letter was in terms as follows :—

“ *Manchester, 2nd January, 1867.*

“ Messrs. *Balfour & Co. Calcutta.*

“ Dear Sirs,—Referring to the goods shipped on triplicate a/c under special agreement against which Messrs. *Small & Co.* have given their acceptances, you will please hand over all such goods (particulars of which we enclose) to Messrs. *Barton, Baynes & Co., Calcutta.* We agree to take said goods on our own risk and responsibility. We have agreed to return to Messrs. *Small & Co.* the following acceptances :—

£	s.	d.	
“ 2,943	“ 8	“ 2.	due 13th March, 1867 a/c <i>Warwick Castle.</i>
589	“ 3	“ 0.	“ 1st April “ “ <i>Tantallon Castle.</i>



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£	s.	d.	
4,707	5	2	due 9th May, 1867 a/c <i>Kenilworth Castle</i> .
208	0	11	„ „ „ „ ditto.
804	5	2	„ 22nd May „ „ <i>Riversdale</i> .

“ In the meantime, untill we hear that you have handed over the goods, we have made *Willams, Deacon & Co.* custodians for said acceptances, also of £217. 1s. 10d. paid by Messrs. *Small & Co.*, for charges on account of the said goods. We refer you at foot to Messrs. *Small & Co.*'s signature, and also to Mr. *Balfour* and Messrs. *Mattheson & Co.*'s signatures, in confirmation of this. Messrs. *Mattheson & Co.* of course sign this in case any goods have arrived in *Calcutta* and are delivered to *Jardine, Skinner & Co.* of *Calcutta*, and this Letter is sufficient authority in such case for Messrs. *Jardine, Skinner & Co.* to hand over the goods to *Barton, Baynes & Co.*

“ We are, dear Sirs,

“ We confirm the above.

“ Yours truly,

“ *Mattheson & Co.*

“ *THOMAS BARLOW & BRO.*

“ *Small & Co.*

“ *Lewis Balfour.*”

The Respondent, *Lewis Balfour*, for *Balfour & Co.* and *Small & Co.*, by such Letter, concurred in directing *J. H. Robinson*, the only Partner of *Balfour & Co.* then resident at *Calcutta*, to hand over the said shipments to Messrs. *Barton Baynes & Co.*, of *Calcutta*, as Respondent's Agents, which he accordingly did in *January*, 1867, and Messrs. *Barton, Baynes & Co.* gave him the following receipt :—



" *Calcutta, May 16, 1867.*

"Received from Messrs. *Balfour & Co.* the under-mentioned invoices and Bills of lading as instructed by Messrs. *Thomas Barlow & Brother, Manchester.*

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<i>Warwick Castle</i>	. . . . .	78/b.
<i>Tantallon Castle</i>	. . . . .	17/b.
<i>Riversdale</i>	. . . . .	30/c.
<i>Kenilworth Castle</i>	. . . . .	143/b and c.

proceeds to be remitted to Messrs. *Alexander Cunliffe & Co.* for special appropriation.—*B. B. & Co.*"

After the receipt of these Bills of lading, and on the 15th of *January, 1867*, *James Hamilton Robinson* received a Telegram from *London*, from *Lewis Balfour*, directing him to deliver the goods so shipped on triplicate account as aforesaid to the Firm of *Barton, Baynes, & Co.* In pursuance of this Telegram *Robinson*, on the 18th of *January, 1867*, indorsed and delivered over the Bills of lading and goods to Messrs. *Barton, Baynes, & Co.* At such time the Firm of *Balfour & Co.* had not merely stopped payment, but had been in insolvent circumstances for some years.

On the 17th of *February, 1867*, *Robinson* presented his petition of insolvency to the Insolvent Court in *Calcutta*, and was duly declared insolvent.

The then Official Assignee, on the 1st of *March, 1867*, demanded the re-delivery of the goods and documents from the Firm of *Barton, Baynes & Co.*, who refused to comply with such demand.

An application to enforce the demand was made to the Insolvent Court, and by an Order of that Court of the 4th of *March, 1867*, Messrs. *Barton Baynes & Co.* were directed to show cause, on the 11th of



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*March*, why they should not re-indorse and deliver over to the Official Assignee all goods, Bills of lading, and other documents connected with such goods. The parties appeared and showed cause against such Order, which was, however, on the 16th of *March*, 1867, made absolute. *Barton, Baynes & Co.*, in compliance with the Order, re-delivered over the goods, or the produce thereof, and the Bills of lading and other documents connected therewith.

*Barlow* then brought the present suit, on the 29th of *June*, 1867, in the High Court of *Calcutta*, against the Official Assignee, claiming the goods and the produce thereof, and also by his plaint claimed interest on the amount received and made over to the Official Assignee ; and further prayed that the Order of the Insolvent Court might be cancelled.

The Official Assignee filed his written statements setting up the several matters aforesaid, and prayed that the suit might be dismissed, as the relief sought could have been obtained in the insolvency proceedings.

The suit came on for hearing before the High Court in its ordinary original civil jurisdiction. Witnesses were examined, and on the 15th of *June*, 1868, Mr. Justice *Norman*, who sat alone, by his judgment decided in favour of the Official Assignee and against the claim of *Thomas Barlow*, on the ground of the transfer being fraudulent and void as against the Creditors of *Balfour & Co.*

*Barlow* appealed to the High Court in its appellate jurisdiction, and by his memorandum of appeal submitted that the judgment was erroneous, on the following grounds :—First, as the Court found that under the agreement mentioned in the plaint the goods in question were shipped to *Balfour & Co.*, and by



the terms of the agreement the proceeds of the goods were specifically appropriated for remittance home in first-class Bills; secondly, that the transfer of the 2nd of *January*, 1867, was *bonâ fide*, and for consideration; thirdly, that, even if no such transfer were established, and goods were placed in the hands of *Barton, Baynes & Co.*, not by way of fraudulent transfer or preference, but to carry out the terms of the contract under which the goods were shipped; fourthly, that at the time of the insolvency of *Robinson*, the goods were not in his order or disposition; and, fifthly, that, at any rate, the Plaintiff had a joint interest in the goods and their proceeds, and the Court had jurisdiction to interfere, and ought to have interfered, to prevent the proceeds being divided between the general Creditors of *Robinson*.

The Respondent, by a memorandum of objections under section 348 of Act, No. VIII. of 1859, submitted that Mr. Justice *Norman* should have declared that the Firm of *Balfour & Co.* were Partners with the Firms of *Small & Co.* and *Thomas Barlow* in the goods in the plaint mentioned, and that the Firm of *Balfour & Co.* were held out and known as the only reputed Owners of the goods then in *Calcutta*; and that the Court should have found that the goods, at the time of making over the same by *Robinson*, the only Partner of Messrs. *Balfour & Co.* then in *India*, and at the time of presenting the petition on which the order of insolvency was granted, were, with the consent of the Plaintiff as such co-Partner, in the order and disposition of *Robinson*, vested in the then Respondent, under such adjudication, on behalf of the general Creditors of *Balfour & Co.*

The Chief Justice, Sir *Barnes Peacock*, was in

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favour of reversing the decree of the of 15th of *June*, 1868. Mr. Justice *Markby* gave his opinion for sustaining the decree; and the Judges of the Appellate Court being equally divided, the decree was reversed, in accordance with sect. 36 of the Letters Patent constituting the High Court. The Chief Justice proposed that the suit should be reheard before a full bench of Judges, but Mr. Justice *Markby* was of opinion the Court had not power to direct the case to be so reheard, and declined to accede to any such rehearing.

The Chief Justice, in his judgment, expressed his opinion, that there was a valid and *bonâ fide* transfer to the Respondents by the agreement of the 2nd of *January*, 1867; that there was no fraud or fraudulent preference within sect. 23 of the Indian Insolvent Act, 11th & 12th *Vict.* c. 21, and that the doctrine of reputed ownership under that Act had no application; and, moreover, that according to the true construction of the original agreement of 1862, there was a specific appropriation of the proceeds of the said shipments to meet the Bills drawn on and accepted by *Small & Co.* for the price, and that such specific appropriation found the said shipments and their proceeds in the hands of *Balfour & Co.* and their Assignees, and, *a fortiori*, was good against the Assignee of one or two members of the Firm. In his judgment, the Chief Justice said: "It appears to me that this transaction of the 2nd of *January* was intended by the parties to be carried out, that it was honest and *bonâ fide*, and that the property in the goods passed by it to Messrs. *Barlow Brothers*. Further, I hold, that if the property did not pass to *Barlow Brothers*, the proceeds were specifically



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appropriated for taking up the Bills of *Balfour & Co.* on *Small & Co.*, and until those Bills were paid Mr. *Robinson* had no interest in the goods, which could justify his Assignee in stopping the remittance of the proceeds, or of taking the property out of the actual possession of the Plaintiff's Agents, Messrs. *Barton, Baynes & Co.* If the transfer of the 2nd of *January*, 1867, did not transfer the property and Mr. *Robinson's* interest under it, it is clear that Mr. *Robinson* was not entitled to the proceeds, but merely to one-ninth of the profits, if any, after all the costs and expenses should have been paid out of the proceeds. The speculation, however, as already shown, resulted in a loss. It has been urged that *Small & Co.* were in insolvent circumstances when the Letter of the 2nd of *January* was signed, but *Small & Co.'s* Assignees have not interfered. In that respect the case resembles *Thayer v. Lister* (a). The Assignee of *Robinson* and *Balfour* had nothing to do with Messrs. *Small & Co.'s* insolvency or bankruptcy." Then, after observing that the Respondent had performed the agreement on his part, the Chief Justice proceeded:—"The question then is, whether the Assignee of *Robinson*, who would have been entitled to only one-third of one-third, or one-ninth of the profits, if any, would have been entitled to stop the remittances if the goods had not been delivered over to the Plaintiff's Agent, or was justified in taking the goods or the proceeds out of the hands of the Plaintiff's Agent, and to administer them for the benefit of the general body of Creditors of *Robinson* and *Lewis Balfour* the elder. It appears to me that he is not, and that it ought to be declared that

(a) 30 L. J. (Ch.) 427.



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the goods and proceeds are the property of the Plaintiff."

Mr. Justice *Markby* agreed in opinion with Mr. Justice *Norman*, and based his decision on the grounds of the three Firms being Partners in the shipments in question, and of the agreement of the 2nd of *January*, 1867, being a fraudulent preference of the Respondent by *Small & Co.* and *Balfour & Co.*, stating that it was rather a question of fact than of law. On the point of the reputed ownership of the goods by *Balfour & Co.* under the Indian Insolvent Act, he said that so far as he had formed an opinion, he entirely concurred with the Chief Justice. He also intimated an opinion that it was not open to the Respondent on the pleadings and issues to contend that the proceeds of the shipments were specifically appropriated.

By the decree made thereon in favour of the Plaintiff, the Defendant was ordered to pay the Plaintiff the sum of Rs. 95,279. 10a. 1p., together with interest at 6 per cent. from the dates and upon the amounts in the decree specified, to the date of realization.

The Appellant appealed to Her Majesty in Council from this decree.

After the appeal to *England*, *Albert Birmingham Miller* was appointed Official Assignee and Assignee of the estate and effects of *Robinson* and *Lewis Balfour* the elder, in the place of *John Cochrane*, the original Appellant; and by an Order in Council *Miller* was substituted in the appeal in the place of *Cochrane*.

Sir *R. Palmer*, Q.C. and Mr. *J. D. Bell*, for the Appellant.



There is a preliminary objection, which, if sustained, will render any further consideration with respect to the merits unnecessary. The cause was first heard before Mr. Justice *Norman*, who dismissed the suit, and such dismissal having been affirmed by Mr. Justice *Markby*, who sat with the Chief Justice, Sir *Barnes Peacock*, on the hearing of the appeal but who differed from him, we submit, that the High Court in its appellate jurisdiction ought to have affirmed the decree, and was not warranted in giving a decision against the Appellant. The 36th section of the Letters Patent of 1865, constituting the High Court at *Bengal* (*a*) is not in any way contradicted or affected by the 26th rule of the High Court (*b*), which, in fact, only explains the 36th clause of the Letters Patent, and the Appellate Court ought, therefore, to have dismissed the appeal.

[Their Lordships declined expressing any opinion

(*a*) Sect. 36 provides, that any function directed to be performed by the High Court in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or Division Court, constituted under the provisions of the Act, the 24th & 25th *Vict.* c. 104, "and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail."

(*b*) Rule 26 directs that "appeals from the decision of one Judge in the exercise of ordinary original civil jurisdiction shall be heard and determined by at least two other Judges; and in case the two Judges who exercise the appellate jurisdiction differ in opinion, they may direct that the case shall be reheard before a Division Court, consisting of themselves and some other Judge or Judges; and if no such Order be made, the decision shall be affirmed." See Rules, *Macpherson's* New Civil Proceedings for *Brit. India*, Appx. p. cxvi. [Ed. 1871.]

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on this point, and desired the Appellant's Counsel to proceed on the merits.]

Then upon the merits our contention is, that neither in Law nor Equity was there any such specific appropriation of the proceeds of the sale of the goods, to support the decree pronounced against the Official Assignee, awarding payment to the Plaintiff. Even if it should be held to have been a specific appropriation of the proceeds of the goods in a suit properly framed, which this was not, yet we submit, that the Order of the Insolvent Court, pronounced on the 16th of *May*, 1867, not having been appealed against, bound the Appellant as to the matter decided therein, and he had no right to sue: *Garbett v. Veale* (a); but having submitted to the jurisdiction of the Insolvent Court, he should have preferred his claim there. The assignment of goods to the Plaintiff, on which he grounds his suit, so far as the assignment purported to be a rescission of the contract or agreement theretofore existing between the Plaintiff and the Firm of *Balfour & Co.* and *Small & Co.*, was absolutely null and void against the Official Assignee: *Dutton v. Morrison* (b); *In re Wait* (c); *Barker v. Goodair* (d); *Taylor v. Fields* (e); *Young v. Keighly* (f). [The Lord Justice JAMES:—This differs from ordinary partnerships. It is a series of joint adventures.] The two Firms of *Balfour & Co.* and *Small & Co.* at the time of the assignment, being in utterly insolvent circumstances, and the assignment made within two months of the filing of the petition of *Robinson*, such an assignment was a voluntary and

(a) 5 Q. B. 408, 414.

(c) J. & W. 605-8.

(e) 4 Ves. 396.

(b) 17 Ves, 193.

(d) 11 Ves. 85.

(f) 15 Ves. 557.



fraudulent preference, in no way binding upon the Official Assignee, or the Creditors of the Firm of *Balfour & Co.* Fraud will vitiate a contract of sale: the principles are clearly laid down in *Attwood v. Small* (a). It was a colourable and fraudulent assignment as against the general body of the Creditors of Messrs. *Balfour & Co.*, whose consent was in no way obtained by *Lewis Balfour*, senior, the only member of the Firm of *Balfour & Co.* who entered into the agreement. Indeed the Firm of *Small & Co.* and *Lewis Balfour*, senior, were precluded from making such assignment by being in insolvent circumstances. The indorsement of the Bills of lading and delivery over of the goods to *Barton Baynes & Co.* by *Robinson*, having been made within two months before insolvency, were acts fraudulent and void under the 24th clause of the Indian Insolvent Act, 11th & 12th *Vict.* c. 21, which is similar to the Statute, 7th *Geo.* 4, c. 57, s. 32, under which Statute, in similar circumstances, an assignment has been held void as against the Official Assignee: *Becke v. Smith* (b). So by the Bankruptcy Act, 12th & 13th *Vict.* c. 106, s. 126: *Marks v. Feldham* (c); and by the *Jamaica* Insolvent Act, 11th *Vict.* c. 28, s. 67: *Nunes v. Carter* (d). Even if such acts could be deemed merely voidable, as against the Official Assignee, by the proceedings in the Insolvent Court and the High Court, the Official Assignee sufficiently manifested his opposition to the same, and his right to treat the same as invalid; and we rely on both such grounds, whether fraudulent and void, or merely

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(a) 6 Cl. & F. 232.

(b) 2 M. & W. 196.

(c) Law Rep. 5 Q. B. 279.

(d) 4 Moore's P. C. Cases (N. S.), 222; Law Rep. 1 P. C. 349.



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voidable; and we submit, that the 24th clause of the above Act not merely renders such acts fraudulent and void, but expressly and positively directs that such acts shall be deemed fraudulent and void from their inception.

Again, the goods were in the order and disposition of the Firm of *Balfour & Co.* up to and at the time of the adjudication of insolvency against *Robinson*, and as such passed to, and became vested in the Official Assignee of *Robinson*, under the provisions of the 23rd section of the Indian Insolvent Act, 11th & 12th *Vict.* c. 21.

And, lastly, we submit that, with respect to interest, the Official Assignee having received the proceeds of the goods under the Order of the Insolvent Court, and the amount so received having been paid into the Bank in accordance with the rules of the Court, and no application being made to him, or the Court, to invest the same, the Plaintiff was not entitled to the interest decreed.

Their Lordships directed the Respondent's Counsel to confine themselves to the question of interest.

Mr. *Jessell*, Q.C., and Mr. *C. E. Pollock*, Q.C.,  
and Mr. *Bowring*, for the Respondents.

Interest was properly allowed by the Court below. The proceeds of the sale of the goods were paid into Court, and no step was taken by the Official Assignee to invest the proceeds. In *Young v. Guy* (a) a party recovered payment at law, but on equitable grounds repayment was decreed, and the Court held that the Plaintiff in equity was entitled to interest on the amount recovered from the time of its payment.

(a) 8 Beav. 147.



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Judgment was reserved, and now delivered by

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The Lord Justice MELLISH :—

This was a suit brought in the High Court of *Calcutta* by *Thomas Barlow* who traded under the style of *Thomas Barlow & Brother*, against the Defendant, who is the Official Assignee of the Court for the relief of Insolvent Debtors at *Calcutta*.

The plaint set out the terms of an agreement made in 1862 by the Plaintiff's Firm, the Firm of *Small & Co.*, of *London*, and the Firm of *Balfour & Co.*, of *Calcutta*, consisting of *Lewis Balfour* the elder, *James Hamilton Robinson*, and *Lewis Balfour* the younger, respecting goods to be bought by the Plaintiff's Firm at *Manchester*, and shipped by *Small & Co.*, to *Balfour & Co.* at *Calcutta* by which each of the three Firms was to take one-third share of profit or loss; the Plaintiff's Firm to draw Bills at six months on *Small & Co.* for the cost of the goods, the Bills to be discounted by *Overend, Gurney & Co.*; *Balfour & Co.* to remit Bills on *Small & Co.*, as a provision for the six months' Bills, and *Balfour & Co.*, on the sale of the goods, specially to remit the proceeds to *Overend, Gurney & Co.*, and *Overend, Gurney & Co.* thereupon to give up *Balfour & Co.*'s drafts on *Small & Co.* under rebate. The plaint states, that the Plaintiff, under that agreement, in *September* and *October*, 1866, purchased and shipped goods to *Balfour & Co.* in *Calcutta*, and that after the goods were shipped, another agreement was come to between the Plaintiff, *Small & Co.*, and *Balfour & Co.*, whereby, in consideration of the Plaintiff taking upon himself all risk attaching to the ship-



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ments, and discharging the Firms of *Small & Co.* and *Balfour & Co.* from all liability to pay any losses, these Firms made over to the Plaintiff all their respective right, title, and interest in the shipments; that shortly after the Plaintiff directed *Balfour & Co.* to hand over the shipments and documents relating to the same to *Barton Baynes & Co.*, and that the Bills of lading were accordingly handed over by *Balfour & Co.* to the Firm of *Barton, Baynes & Co.*; that the shipments arrived in *Calcutta*, and were taken possession of by *Barton, Baynes & Co.* and the larger portion thereof sold on account of the Plaintiff; that *James Hamilton Robinson* filed his petition in the Court for the relief of Insolvent Debtors at *Calcutta* on the 7th of *February*, 1867, and *Lewis Balfour* the elder, on the 18th of *May*, 1867; that the Defendant, as such Assignee, on the 1st of *March*, 1867, demanded possession of the goods from *Barton, Baynes & Co.*, and on their refusal to comply with the demand he procured an Order from the Insolvent Court requiring them to re-indorse and re-deliver to the Defendant, all the documents and goods belonging to the estate of the Insolvent as were then in their possession, and to account to him for all they had parted with; that in consequence of that Order *Barton Baynes & Co.* handed over twelve bales of goods to the Defendant, and paid to him the net proceeds of those which had been sold, Rs. 90,563. 13a. 1p. The plaint concluded with a prayer, that the Plaintiff's rights in respect of the goods, or the net proceeds thereof, and money might be declared, and that the Defendant might be directed to pay the same, with interest, to the Plaintiff.



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The Defendant, in his answer, denied the alleged agreement by which the Firms of *Small & Co.*, and *Balfour & Co.*, assigned their interest in the shipments to the Plaintiff; and also alleged, that such agreement, if made, and the delivery of the Bills of lading and goods to *Barton, Baynes & Co.* under it, was a fraud upon the laws relating to Bankruptcy and Insolvency; that it was void from having been made within two months of the insolvency of *James Hamilton Robinson*; and that the goods, at the time of *James Hamilton Robinson* filing his petition, were in his possession, order and disposition, with the consent of the true Owner.

The case came on to be tried before Mr. Justice *Norman*; and it was proved at the trial, that the original agreement for the consignment of goods to *Calcutta* was acted upon by the three Firms up to the failure of *Overend, Gurney & Co.*, in *May*, 1866; that after that time the parties never obtained any Firm to take the place of *Overend, Gurney & Co.*, that the Plaintiff, nevertheless, bought the goods in question at *Manchester*, and shipped them through *Small & Co.*, in four Ships, to *Balfour & Co.*, in *Calcutta*; that the Plaintiff drew Bills on *Small & Co.*, who accepted them for the price of the goods, and discounted the Bills with Messrs. *Cunliffe*. A correspondence was given in evidence between the Plaintiff and *Small & Co.*, and *Lewis Balfour*, senior who was then in *London*, during the autumn of 1866, with reference to procuring a Firm to supply the place of *Overend, Gurney & Co.*; but that no agreement was come to on that subject; that early in *December*, 1866, *Small & Co.* stopped payment, and dishonoured Bills drawn by *Balfour & Co.* That it was known



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to all the parties in *London* that the stoppage and insolvency of *Small & Co.* would necessarily involve the stoppage and insolvency of *Balfour & Co.* That on the 15th of *December*, 1866, *Small & Co.* wrote as follows to the Plaintiff:—"Pending the completion of arrangements, we have sent out a Telegram, jointly with Messrs. *Balfour*, directing all funds and goods then in their hands to be handed over to *Jardine, Skinner & Co.*" And, on the 18th of *December*, the Plaintiff wrote to *Balfour & Co.* at *Calcutta*:—"In consequence of correspondence with Messrs. *Small & Co.*, you will please hand over the goods as per annexed list, to Messrs. *Barton, Baynes & Co.* They are bought, you are aware, under special agreement, in triplicate account." On the 2nd of *January*, 1867, the agreement for the transfer of *Small & Co.*'s and *Balfour & Co.*'s interests in the shipments was made, and is contained in a Letter of that date from the Plaintiff to *Balfour & Co.*, and was also signed in the corner by *Small & Co.* and *Lewis Balfour*. [His Lordship read the Letter (*ante*, p. 213), and proceeded:—]

The subsequent facts were proved to have taken place as alleged in the plaint. Upon this evidence Mr. Justice *Norman* held, that the transfer of the interest of *Balfour & Co.* to the Plaintiff by the agreement of the 2nd of *January*, 1867, was fraudulent and void as against the Defendant, and on that ground dismissed the suit with costs. From that judgment an appeal was heard before two of the Judges of the High Court, the Chief Justice Sir *Barnes Peacock*, and Mr. Justice, *Markby*. Mr. Justice *Markby* was of the same opinion as Mr. Justice *Norman*, and thought his judgment ought to



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be affirmed, but the Chief Justice was of a contrary opinion, and, in accordance with his opinion, and under sect. 36 of the Letters Patent of the High Court, the judgment of Mr. Justice *Norman* was reversed, and a decree was made in favour of the Plaintiff, and the Defendant was ordered to pay to the Plaintiff, Rs. 95,279. 10a. 1p, together with damages, in the nature of interest at 6 per cent. from the days when the cause of action as to each part of the principal arose up to realization, with the Plaintiff's costs of the original suit and of the appeal.

From this decree an appeal has been brought before their Lordships, and a preliminary objection to the decree was raised, that the 36th clause of the Letters Patent of the High Court was not applicable; and that under the rules made by the Judges of the High Court the Judges who heard the appeal being equally divided in opinion, judgment of affirmance of the Decree of the Court below ought to have been entered. Their Lordships do not think it necessary to give any opinion on this question. They are of opinion, that it is their duty to hear and decide the case on the merits, and that it is quite immaterial how the judgment in the High Court ought to have been entered in consequence of the difference of opinion between the Judges, because the judgment of the High Court, as entered, cannot be reversed, if it was right upon the merits.

With respect to the case on the merits, it is clear that the goods were not in the order and disposition of *James Hamilton Robinson* at the time he petitioned the Insolvent Court, because he had previously indorsed and handed over the Bills of lading relating



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to all the goods to *Barton Baynes, & Co.*, and the principal question to be determined is, was the transfer of the interest of *Balfour & Co.* in the shipments to the Plaintiff, by the agreement of the 2nd of *January*, 1867, binding on the Defendant. Their Lordships are of opinion, that *Lewis Balfour* the elder, had, under the circumstances of this case, authority as a Partner in the firm of *Balfour & Co.* to bind his Firm to that Agreement by attaching his signature to the Letter of the 2nd of *January*, 1867, and that, therefore, the Agreement was binding upon the Defendant unless the Defendant can make out that the Agreement has rendered void by the provisions of the 11th & 12th *Vict. c. 21*, or was a fraud upon the Creditors of *Balfour & Co.*

It is desirable, in the first instance, to consider what was the position and the legal rights of the parties at the time the Agreement of the 2nd of *January*, 1867, was entered into. Mr. Justice *Markby*, in his judgment, states his opinion to be, that if the assignment of the second of *January*, 1867, had not been made, the general Creditors of *Balfour & Co.* would have been entitled to one-third of the goods. Their Lordships can not agree with this opinion. It is obvious that, even if Mr. Justice *Markby* was right in thinking that the property in the goods whilst on board Ship was vested in the three Firms; still, that the Creditors of *Balfour & Co.* could have no right to any part of the proceeds of the goods until all the liabilities of the three Firms, with reference to the adventure, were first satisfied; and one of these liabilities was an obligation to satisfy the Bills drawn by the Plaintiff on *Small & Co.* Their Lordships also agree with the Chief Justice, and for the reasons



stated by him, that neither the circumstances that the parties had not procured any Firm to supply the place of *Overend, Gurney & Co.*, nor the insolvency of *Small & Co.*, and of *Balfour & Co.*, interfered with the right of the Plaintiff to have the agreement between the three Firms carried out: that is to say, his right to have the goods sold in *Calcutta*, and the proceeds returned to *England* in good Bills, for the purpose of satisfying the Bills drawn by the Plaintiff on *Small & Co.*

Their Lordships are also of opinion, that the insolvency of *Balfour & Co.* deprived them of the right of acting as Factors for the three Firms in the sale of the goods at *Calcutta*, and the remission of the proceeds to *England*, and that, therefore, the orders to transfer the goods first to *Fardine, Skinner & Co.*, and afterwards to *Barton, Baynes & Co.*, which were sent out to *Calcutta* in *December, 1866*, were proper orders, and their Lordships think, that *James Hamilton Robinson* would have been perfectly justified in handing over the Bills of lading to *Barton, Baynes & Co.*, even if the Agreement of the 3rd of *January, 1867*, had never been made, and the Telegram which was sent out in consequence of it never sent out. Such, then, being the position of the parties, was the Agreement of the 2nd of *January, 1867*, a fraudulent Agreement as respects the Creditors of the Firm of *Balfour & Co.*? When this Agreement was entered into it was quite uncertain whether the consignment of these goods to *Calcutta* would turn out a profitable or an unprofitable adventure, and their Lordships are of opinion, that there is nothing fraudulent or improper in an insolvent Firm parting with or putting an end to a current speculation, the result of which

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is still uncertain, on the best terms they are able. On the contrary, such a course is an honest one to follow. If an honest man discovers he cannot pay a bet if he loses, and is ready to rescind the bet before the event happens, he is not bound to take the chance of winning for the benefit of his Creditors. The rescission and abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one Creditor to others after a debt has been incurred. In the present case it seems to their Lordships clear that, on the 2nd of *January*, 1867, the Plaintiff was not a Creditor of *Balfour & Co.*, and could not have proved against the estate of *Balfour & Co.* in respect of these transactions, and this alone conclusively proves that the agreement was not a fraudulent preference.

It remains to be considered, whether the Agreement of the 2nd of *January*, 1867, and the transfer of the Bills of lading under it, was rendered void by the 11th & 12th *Vict.* c. 21, s. 24, and their Lordships are clearly of opinion, that the case does not come within that section. The fact that the Plaintiff was not at the time a Creditor to the Firm of *Balfour & Co.*, takes the case out of the section, and, moreover, the Agreement was not a voluntary assignment by *Balfour & Co.*, and still less by *James Hamilton Robinson*, of any defined interest in the goods, but was an agreement whereby, in consideration of being freed from all liability to loss, *Balfour & Co.* sold to the Plaintiff their interest in any profit that might be made in the speculation. A further objection was taken that, even assuming the judgment of the Chief Justice to be correct on the general merits of the case, the Plaintiff was not entitled to interest. On



this point it is material to observe that, in the account which was drawn up between *Barton, Baynes & Co.* and the Defendant as Official Assignee, interest is charged, and it, therefore, appears that by the wrongful act of the Defendant the Plaintiff has been deprived of money which was actually making interest, and their Lordships are of opinion that, under these circumstances, a Court of Equity would clearly be disposed to give interest; and it is by no means clear that, even in a Court of Law, although the ordinary rule is, that in actions for money had and received interest is not given, the fact of the Defendant having received interest would not be a sufficient ground for making the Defendant liable to pay interest; and as the High Court have the powers both of a Court of Equity and a Court of Law, their Lordships are of opinion that interest has been properly given.

On the whole, their Lordships will recommend to Her Majesty that the decree of the High Court be affirmed, and this appeal dismissed with costs (*a*).

(*a*) See *Ex parte Copeland* 3 Dea. & Ch. 199, and *Ex parte Prescott*, *Ibid.* p. 218.

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FAEZ BUKSH CHOWDRY... *Appellant* ;

AND

FUKEEROODEEN MAHOMED AHASSUN }  
CHOWDRY ... } *Respondent.\**

*On appeal from the High Court of Judicature at  
Fort William.*

18th July,  
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Suit by A.  
to establish  
his right to  
execute  
Decrees,  
against B.  
and another,  
by attach-  
ment and sale  
of lands in  
possession of  
C., B.'s Son ;  
on the ground,  
that the lands  
were held by  
C. *benamee*, to  
defeat B.'s  
Creditors.  
Evidence  
was given  
that C. was

THE Respondent in this appeal was the Plaintiff in the suit. The Appellant and *Kurreem Buksh Chowdry* and *Rohomutunissa Chowdranee*, were the Defendants.

The object of the suit was for a declaration that a certain estate which the Appellant had purchased was the property of *Kurreem Buksh Chowdry* and *Rohomu-*

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

the real Purchaser of the property sought to be attached, and not a *benamee* holder for B. Nothing but hearsay evidence was given by A. that it was a *benamee* transaction. Held, by the Judicial Committee, following *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, 43), that although there may be, with respect to *benamee* transactions, circumstances which might create suspicion and doubt as to the truth of the case, yet that the appellate Court will not decide upon mere suspicion, but upon legal grounds established by evidence, and that from the evidence in the suit, a *bonâ fide* Purchase by C. was established.



*tunissa Chowdranee* (the Widow of *Kurreem Buksh Chowdry's* Brother), and liable to be sold under an execution decree obtained by the Respondent against them.

The facts of the case were these :—

The estate in dispute consisted of a 13 *annas* 11 *gas*. and 1 *coie*. share of a moiety of *Pergunnah Belgachee*, and the whole of *Pergunnah Bajoo Rass Mohobutpore*. This estate formerly belonged to one *Soriutoollah Chowdry* and *Kurreem Buksh Chowdry*, who many years ago made over the greater part thereof to their respective Wives, in lieu of a marriage settlement. *Soriutoollah Chowdry* having died, his Widow, together with *Kurreem Buksh Chowdry* and his Wives, mortgaged the property to *Khajah Abdool Gunny*, to secure a loan of Rs. 30,000, on the 24th *Bysack*, 1256 (*April*, 1849); and the *Khajah*, on default in payment, took proceedings to foreclose the mortgage; and on the 27th of *April*, 1853, obtained a decree for possession.

On the 6th of *January*, 1857, he sold the estate to the Appellant for Rs. 32,501, and executed a Deed of sale. The Appellant paid in cash Rs. 25,000, and gave a Bond and mortgage of a portion of the property to the Vendor for the balance. The money which was paid in cash was raised by granting a *Putnee* of the estate to one *Gunga Narain Chowdry* and borrowing from him on mortgage and a Bond, on which the Appellant alone was liable, for the sum of Rs. 4,000.

At the time when this sale took place, a portion of the property having been seized for the debts of *Kurreem Buksh Chowdry*, the *Khajah* had put in a claim to the estate as being his, which claim was

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in *May*, 1857, allowed, and the property was directed to be released.

The Appellant obtained possession of the estate, and paid the Government revenue and received the rents.

On the 27th of *July*, 1852, the Respondent obtained decrees against *Kurreem, Buksh Chowdry*, and the widow of *Soriutoollah Chowdry* for the sum of Rs. 3,686. 0. 5.

On the 3rd of *July*, 1860, he seized the property in question under an Order for execution, alleging the property to be that of the judgment Debtors. On the same day the Appellant filed a petition claiming the property as his own; and on the 31st of *December*, 1861, the Judge, Mr. *Kemp*, after hearing evidence, decided in the Appellant's favour, and released the property from attachment.

On the 14th of *May*, 1863, the Respondent—after suing in the Court of *Patna* in the year 1862, which Court refused to entertain the suit on the ground of jurisdiction—brought the present suit in the Court of the Principal *Sudder Ameen* of *Furreedpore*, against the Appellant. The object of the suit was to establish the Respondent's right to put in execution two Decrees which he held against *Kurreem Buksh Chowdry* by attachment and sale of certain lands, which lands he contended belonged to *Kurreem Buksh Chowdry*, though standing in the name of his Son, the Appellant, as he insisted, *banamee*, and which the Respondent contended, was the property of the Appellant and not his Father.

The Appellant put in a written statement, relying, by way of defence, first, on the claim being barred by the Law of limitations; and secondly, on the property being really his own by purchase and not



held *benamee*. The ground on which he contended that the law of limitations applied was, that the suit being brought to set aside a summary decision, by Act, No. 14 of 1859, should have been brought within a year from the date of the decision, and that as the decision was given on the 31st of *December*, 1861, and the suit not actually commenced until the 14th of *May*, 1863, even allowing for the time he was suing in the wrong Court, it was too late.

The Respondent filed a written statement which was an echo of the plaint, but contesting the applicability of the law of limitations.

The Respondent examined Witnesses to prove that the property was held by the Appellant, *benamee* for his Father ; but the Witnesses' testimony amounted to nothing more than hearsay evidence. On the other hand, the Appellant proved actual possession in himself, as Owner, by Witnesses, who were tenants paying him rent.

On the 20th of *December*, 1864, the Principal *Sudder Ameen* of *Furreedpore* (*Oopendro Chunder Nyarutno*, on the remand of the case to that Court), decided that the suit was barred by the law of limitations ; and the principle upon which he came to that conclusion was that as the suit had to be brought within one year from the 30th of *December*, 1861, yet, even allowing for the time which was lost in suing in the Court at *Patna*, more than a year elapsed before the suit was brought ; and he dismissed the suit with costs.

Against that decision the Respondent appealed to the High Court at *Calcutta*. The appeal was heard by the Justices *Morgan* and *Shumboo Nauth Pundit*, who, on the 15th of *May*, 1865, decided,

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that if the suit was one to set aside the summary Order, it was barred by limitation ; but that in the opinion of the Court, the suit was not one within that definition, but was a regular suit to set aside an impediment to the Plaintiff's obtaining an execution of a decree, and, therefore, that the one year law of limitation did not apply, and the Court remanded the case for trial on the merits.

The suit being remanded, the Principal *Sudder Ameen*, of *Furreedpore* (Mr. L. W. Hutchinson), on the 17th of July, 1865, dismissed the suit on the merits, he, in his judgment, giving his reasons for holding that the Appellant was the real Purchaser and not a *benamee* holder. The material part of his judgment was in these terms :—" The Plaintiff's claim hinges on the meagre allegation, that the purchase of the shares in the *Pergunnahs* from *Khajah Abdool Guney* of *Dacca*, by the second Defendant, was *benamee* or fictitious, though the conveyance itself, upon which the transfer of the property is said to have taken place, is admitted to be strictly legal and formal. Of course, the Plaintiff is unable to prove from documents that the purchase was *benamee*, and his Witnesses, eleven in number, merely suppose that the transfer of the property to the second Defendant was fictitious, but the supposition of these Witnesses is insufficient to turn the scale of evidence in the face of facts to the contrary. The execution of the *Kabalah*, and its registration, are unquestionable facts, and now it is to be seen, where did the second Defendant procure the money to make the purchase ? His Father, the first Defendant, is an insolvent with several unsatisfied Decrees, so it is not likely that anybody with sense would accommodate him. The Son, a young man of energy, and



evidently known to his neighbours, came forward to rescue his paternal property, and his friends helped him. *Khajah Abdool Guney*, on the 21st *Pous*, 1263, took Rs. 25,000 in cash and a Bond for Rs. 7,000 payable at a future date, and gave the property to the second Defendant; and another friend, one *Gunga Narain Chowdry*, assisted him with Rs. 22,000 on condition that the second Defendant, after receiving the *Pergunnahs* from *Khajah Abdool Guney*, should pass them over to him in *Putnee*, and at the same time a Bond for Rs. 4,000 was executed, and the money was generously lent. I am glad to observe, that the second Defendant did prove grateful to his benefactor, as there is ample evidence on record that the property was given in *Putnee*. For these reasons I think the *benamee* not proved, and that the second Defendant bought the property in good faith and with his own money, or rather with the money for which he alone would have to make good, should he fail to repay *Khajah Abdool Guney* Rs. 7,000 and the *Chowdry* Rs. 4,000. The case is dismissed, with costs and interest."

The Respondent appealed to the High Court from this judgment, and a division Bench, consisting of the Justices, *H. J. Bayley* and *Shumboo Nauth Pundit*, on the 15th of *January*, 1866, reversed the decision of the Principal *Sudder Ameen*. The Court were of opinion, that the evidence of *Khajah Abdool Guney* showed that he had not intended to convey for the benefit of the Appellant alone but for that of the Father, from whom he expected it would devolve to his children for their support, and that the property was in fact restored to the same person from whom on foreclosure it had been taken, and that the Appel-

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lant's name was used *benamee*. That the Plaintiff, as a Decree-holder, brought the action to obtain a declaration that the property in dispute, released summarily to the Appellant, one of the Sons of *Kureem Buksh Chowdry*, the Debtor, as the Son's property is still the property of the Debtor, and so liable to sale in execution. That *Khajah Abdool Guney*, to whom the property was conditionally sold by the Debtor, was examined in the summary case of execution and an attested copy of his deposition was offered to the Lower Court by the Plaintiff as evidence long before its final disposal and was without any objection on the part of the Appellant, received by the Court. That consequently, the Court allowed the copy of the deposition to be read at that stage of the case. That it appeared from that deposition and the evidence in the case that *Kureem Buksh Chowdry* was not in a solvent state; that he and (not as he and his Son alleged, his Wife and another) had mortgaged the property to the *Khajah*; that on failure of payment as agreed to the mortgage was in due course of law foreclosed; that the *Khajah*, notwithstanding that the property had become absolutely his, finding that *Kureem* and his numerous children had no other means of subsistence, like a generous man offered to return the property to *Kurreem* and his Sons for their maintenance, provided the *Khajah* was repaid the money due to him; that though the sum due to him was below the market value of the property, if sold by competition, the *Khajah* was quite satisfied with a payment of the greater portion of his dues in cash, and even agreed to receive a Bond for the remainder, R. 7,000, from the Appellant, the second Son of the Debtor in whose name the conveyance was taken on



this occasion. That it further appeared that the money paid in cash to the *Khajah* was supplied by one *Gunga Narain Chowdry* as an advance, and the conveyance was made by the *Khajah*, and sums were Rs. 22,000, as consideration for a portion of the property taken by *Gunga Narain Chowdry* in *Putnee*, and another sum of Rs. 4,000, for which he took a Bond from *Faez Buksh*. That *Gunga Narain Chowdry* being examined in this case, stated laconically, that he took the *Putnee* from the Son, lent the money to him, and that the Father had no rights left in the matter. That *Gunga Narain Chowdry* could not be aware of the circumstances that must be naturally expected to have occurred when the Deed of conveyance was executed by the *Khajah* in the presence of *Kurreem Buksh Chowdry*. Yet that this Witness did not like to supply full details from which the Court could clearly understand that the Son alone treated with the Witness; and that the latter was the energetic young man the Lower Court assumed him to be; that that Witness was aware that the Son alone was treating with the *Khajah*, and that he (the Witness) had, in order to oblige the Son, as the Lower Court supposed, lent the money to him alone. That there was nothing in all that the Son was supposed to have done which the Father could not do, and make use at the same time of the the name of the Son. That as that Witness held a *Putnee* granted ostensibly by the Son, his interests, if not a generous desire to assist his Landlord under whom he was holding a *Putnee*, might have induced him not to be more full in his answer regarding the connection of the Father with the property in dispute, than he would otherwise have been. The Court added, "We attach a greater importance to the pointed statements of

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the *Khajah*. We do not think that it proves the case of the Son, because the *Khajah* in one place says, 'he does not know who now holds the estate.' If he had sold to the Son alone, the Father had no occasion to disturb the possession of the Son. The real meaning of the transaction which the *Khajah* deposed to is this:—Knowing that the Father, and through him his children after the Father's death, would, have no other means of subsistence, the *Khajah* agreed to return, as far as he was concerned, the property to the Father, from whom he had received it, thinking that the Father, and through him necessarily his children, might enjoy the property as a maintenance, and that after the father's death it may come to the children as their inheritance. We do not understand that the *Khajah* ever considered that *Gunga Narain Chowdry* was advancing money to *Faez Buksh Chowdry* alone, or that he himself would have conveyed the property for an inadequate price to *Faez Buksh Chowdry* alone for his sole benefit and enjoyment. It is not attempted to be shown that there was any ground or inducement to this generous partiality in favour of that Son. The lower Court has then, we, think, taken an erroneous view of the circumstances of the case, and required the Plaintiff (the Appellant) to prove more than he is bound to show. If the property in dispute, on the evidence of the *Khajah*, is proved not to be the exclusive property of *Faez Buksh Chowdry*, it can only be the property of the Father. In short, we find, that the *Khajah* returned it to *Kurreem*, from whom he had taken it, whatever be the ostensible proprietorship now set up. We are satisfied, therefore, on a full and careful consideration of the whole case, that the



claim of the Plaintiff is right, and that the decision of the lower Court dismissing the plaint was wrong. We accordingly reverse the judgment of the lower Court and decree the appeal and the plaint of the Appellant with all costs of both the Courts."

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The Appellant filed a petition for review of judgment, which was admitted for hearing, and further evidence was taken, and he, according to the rules affecting appeals to Her Majesty in Council, preferred the present appeal from the judgment of the 15th of *January*, 1866, also petitioning the Court that the further evidence taken should be forwarded as part of the record for the purposes of the appeal.

Sir *R. Palmer*, *Q. C.*, and Mr. *J. D. Bell*, for the Appellant.

This is not a case of *benamee*. Suspicious circumstances, of what is supposed to be a colourable transaction, are, not sufficient. Positive proof must be given of the *benamee*. *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (a). The estate was the sole and absolute property of the Appellant by purchase, and was not liable to be taken in execution under the decrees against *Kurreem Buksh Chowdry* and the Widow of *Soriutoollah Chowdry*. But another objection exists as to the procedure. The plaint sought a declaration that the estate was liable to execution under the decrees against those parties, and the finding of the High Court that the estate belonged to *Kurreem Buksh Chowdry* did not entitle the Respondent to the relief sought. According to the Code of Civil Procedure Act, No. VIII. of 1859, sect. 246, the only mode of enforcing a decree where

(a) 11 Moore's Ind. App. Cases, 44.



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property seized in execution is claimed by a third party, is by a summary suit, and there is no power in the Courts to entertain a suit by a Decree-holder against *Kurreem Buksh Chowdry* and the Widow of *Soriuntoollah Chowdry*. In order to sue a person in possession of property intended to be attached, it is necessary to make a declaration that the estate is that of the judgment Debtor.

Mr. *Doyne*, for the Respondent.

The Conveyance by *Abdool Gunnee* was for the benefit of *Kurreem Buksh*, and he took possession of the estate in the like manner as he held before the foreclosure. The use of the Appellant's name was *benamee*, and colourable to defeat Creditors. The question of *benamee* is settled in the cases of *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (a) and *Gopeechrist Gosain v. Gungapersaud Gosain* (b).

The Right Hon. the Lord Justice JAMES:—

In the judgment delivered in the case to which their Lordships have been referred, viz. *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, p. 43), here is this passage:—Undoubtedly there are in the evidence, circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the Appellant; but in matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony." That principle is sufficient to dispose of this appeal, which only

(a) 11 Moore's Ind. App. Cases, 28.

(b) 6 Moore's Ind. App. Cases, 53.



differs from the case referred to in this respect, that in the appeal now to be decided, there is not, in their Lordships' opinion, any legal evidence to create suspicion, or any doubt to be entertained with regard to the substantial honesty of the transaction.

It appears quite clear that the Father, whose judgment Creditor obtained this property, was in insolvent circumstances, that he had not a farthing of money with which to purchase the property in question; that the property was then in the hands of a Mortgagee, who had foreclosed, and had become the absolute Owner of the property, so that it was his to deal with as he thought fit.

Having probably, as was suggested in the judgment of the High Court, kind considerations for the Father and the family, he was induced not to insist on retaining the whole value of the property so acquired, but to allow it to go back to the family, on being satisfied or secured, in some way or other, the real amount of the debt for which he had seized the property.

In that state of things the way in which the transaction was completed was this,—the Son gets a man to lend him part of the money in consideration of a *Putnee* and a Bond. The Son gives a mortgage to the original Mortgagee for parting with the interest which he had obtained under the foreclosure; he gives his Bond, and then the Conveyance is made to the Son.

Their Lordships think, in accordance with the judgment of the High Court, that this was done for the benefit of the family. The whole circumstances show, that it was open to the Mortgagee and to the family to do it, not by a Conveyance to the insolvent

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Father, or in trust to the insolvent Father, which would give it to the Creditors, who had no right, equitable or moral, with regard to this property, but to give it in such a way as best to effect their object, that is, to give it to the Son, who seems to have been the proper man to carry out the arrangement for himself and for his family.

Under those circumstances, their Lordships think, that the judgment of the Principal *Sudder Ameen* was right; and they will, therefore, humbly recommend to Her Majesty, that the judgment of the High Court ought to be reversed, and that in lieu thereof there should be an order dismissing the appeal from the Principal *Sudder Ameen*, with costs.

The Appellant is to have the costs of this appeal.

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KOOLDEEP NARAIN SINGH ... *Appellant* ;

AND

THE GOVERNMENT and others ... *Respondents*.\*

*On appeal from the High Court of Judicature at Fort William, in Bengal.*

THIS suit was instituted by the Appellant to obtain possession of *Mouzahs Khutteel* and *Domriah*, appertaining to *Pergunnah Bhaugulpore*. The Appellant founded his title as auction Purchaser, under a sale by auction of the *Zemindary*, on the 28th of *April*, 1863, for arrears of Government revenue under which the *Mouzahs* are held.

The Respondents disputed the Appellant's claim

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

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An auction Purchaser of a *zemindary* at a sale for arrears of Government revenue, cannot resume lands, held under a *ghatwally* tenure, at a fixed rent, created before the Permanent Settlement, on the ground, that the services have ceased to be performed by the

*Ghatwal*, and that there was no necessity for such services; if the Government refuse to renounce its claim to the performance of such *ghatwally* services.

The omission of words of inheritance in a *Sunnud*, dated in 1743, granted by the then ruling Power, which confirmed a previous Grant, not in evidence, of the lands being held *ghatwally*, is not sufficient proof *per se*, that such Grant was not hereditary, when evidence of long and uninterrupted usage shows that the lands have descended from Father to Son as *ghatwally* for more than a hundred years.

Before the British rule in *India*, it was customary, where the tenure was in fact hereditary and passed as hereditary from Father to Son, to take out a new *Sunnud* from the ruling Power on each descent.



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on the ground, that the *Mouzahs* were held under an hereditary *ghatwally* tenure at a fixed rent created before the Permanent Settlement.

The Appellant admitted that the *Mouzahs* had been granted by *Sunnud*, on condition of *ghatwally* services, but insisted that as the performance of such services had been dispensed with for a long time, and that as there was no longer a necessity for such services, he was entitled to put an end to the tenure and recover possession.

The original Grant creating the tenure was not produced, but it was in evidence that in 1743, more than twenty, years before East India Company obtained the *Dewanny*, a *Sunnud* confirming the tenure was granted to one *Mahadeo* to "take care of the *Ghats* or passes, so that Travellers may pass without fear ; " and that since that date the *Mouzahs* had been held under that tenure in a strict course of descent from Father to Son. The Appellant insisted that this *Sunnud* did not confer hereditary rights, as it contained no words of inheritance. It also appeared that, in addition to the *ghatwally* services, a quit-rent of Rs. 61 had always been paid for the two *Mouzahs*, and at the time of the Permanent Settlement of the *zemindary*, in assessing the amount of income to be paid by the *Zemindar* to the Government, the amount in respect of the two *Mouzahs* was fixed at the same amount as that which was always payable by the holders of the tenure, viz., Rs. 61 *per annum*, the Government confirming that amount as a permanent assessment. By a suit for rent decided before the Permanent Settlement against *Monoruth Singh*, the Son of *Mahadeo*, put in evidence, it further appeared, that Rs. 61 was the fixed rent at which the two *Mouzahs* were held.



The Appellant instituted the present suit on the 27th of *April*, 1864.

The Respondents respectively filed statements by way of answers, and the Government, in their statement, contended that, unless the Government, which had a right to demand Polices services, renounced its claim and demand, the Appellant had no right to resume or assess the *ghatwally* tenure; and it was declared on the part of the Government, that it had not renounced its right to demand *ghatwally* services, and that it was intended to enforce the demand when necessary.

The Principal *Sudder Ameen* of *Bhaugulpore* (*Nurotum Mullick*) delivered judgment, in which he dismissed the suit with costs, holding that he was governed by the decision of the High Court, in the case of *Munrunjun Singh v. Rajah Lelanund Singh* (3 W. R. 84), and he expressed his opinion, that the Defendants' tenure was protected under Act, No. XI., sect. 37, of 1859, as being a tenure held at a fixed rent before the Permanent Settlement.

Against this decree the Appellant appealed to the High Court.

On the 20th of *June*, 1866, the appeal was heard before a Division Bench consisting of the Justices, *Jackson* and *Markby*, who concurred in referring the appeal for the decision of a full Bench of the High Court, on the ground, that a leading question as to the nature of a *ghatwally* tenure founded on the *Sunnud* relied upon had been adjudicated on by another Division Bench (the above case referred to by the Principal *Sudder Ameen*), in which decision Mr. Justice *Jackson* stated he could not concur.

Accordingly, the appeal was heard by the full

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Bench, composed of the Chief Justice, Sir *Barnes Peacock*, and the Justices *Trevor*, *Loch*, *Jackson*, and *Shumboo Nath Pundit*.

On the 8th of *September*, 1866, *seriatim* judgments were pronounced by the Chief Justice and the Justices constituting such full Bench, in the result dismissing the appeal with costs (*a*).

A difference of opinion prevailed among the Judges as to the grounds on which the Plaintiff's suit should be dismissed.

The judgment of the Chief Justice was, in effect, that the tenure had been granted, as far back as the year 1743, to *Mahadeo*, as a *ghatwally* tenure, in confirmation of a previous Grant of the same tenure, not produced in evidence ; that, after *Mahadeo*, his Son had held, paying rent from before the Permanent Settlement, at the rate of Rs. 61 ; and that " such a Grant, coupled with long usage, such as that which had prevailed in the present case, in which the tenure had passed from ancestor to heir without objection of several generations, would be sufficient to show that the grant was a grant of inheritance," and that in cases of Mahomedan grants it seemed that words of inheritance were not necessary, citing *Baillie* on "Land Tax of *India*," Intro. p. 47. The Chief Justice doubted, without deciding the point, whether the *Sunnud* did not give of its own force a heritable estate to *Mahadeo*, but held that, as the original Grant was not forthcoming, long usage might be received in evidence to show the effect of the original Grant as creating a tenure of inheritance ; and upon the whole of the evidence the Chief Justice expressed his opinion that—"the evidence was sufficient to prove


(*a*) See case reported, *nom. Baboo Koolodeep Singh v. Mahadeo Singh*, 6 W. R., 199.



that the Defendants have been holding under a valid tenure of inheritance upon *ghatwally* service and a quit-rent of Rs. 61. He was also of opinion, that in such a case the *Zemindar* had no right to dispense with the services of the *Ghatwal*, and resume the land, and that the Defendants had as good a right and title to the lands as the Government to the revenue." He referred to certain previous rulings of the *Sudder* and High Courts in *Ghatwally* cases, and expressed his dissent from them, so far as they held, that the land of the *Ghatwal* being held by him in lieu of wages, might be resumed as soon as the Government had no further need of the services; and he was also of opinion, that the Defendants' tenure was protected by one or other of the exceptions contained in sect. 37 of Act, No. XI. of 1859.

Mr. Justice *Trevor* differed from the Chief Justice, as to the effect of the *Sunnud* to *Mahadeo*, and was of opinion, that it was in its express terms personal to *Mahadeo*, and operated merely as a life grant, and that even by the light of the subsequent usage as to the effect of the Grant, the original Grant could not be presumed to have been hereditary in terms. But (he added) it is in my opinion, one of those Grants which were so common in Mahomedan times, in terms limited to the life of the Grantee, but which by usage were considered to convey a hereditary right with or without the payment of a fine. Moreover, the original Grantee died, before the Decennial Settlement, and at that time his Son, *Monoruth Singh*, was in possession. Since then, the Grandson and Great-grandson of *Mahadeo* had succeeded, and as far as the evidence went, as a matter of right. That the course of actual succession under it, confirmed the opinion expressed by him as to the nature

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of the original Grant, and that direct successions had taken place, notwithstanding that the estate had been sold three times for arrears of revenue, and the Plaintiff was the fourth Purchaser. He differed also from the Chief Justice, in thinking, that sect. 37 of Act, No. XI. of 1859, did not apply to the case, being applicable only to tenures paying money rents, and not to service tenures.

Mr. Justice *Loch*, without going into the matters discussed by the two preceding Judges, put his judgment on another ground, viz.,—that as the *Ghatwals* had not refused to perform *ghatwally* services, and the Government had declared their intention of preserving the right to their services, the Plaintiff could not resume the lands.

Mr. Justice *Jackson* was of opinion, that sect. 37 of Act, No. XI. of 1851, did not apply. He also differed from the Chief Justice in thinking, that there was no such analogy, as the Chief Justice had expressed, between this and English feudal tenures. He observed, that there was “a clear distinction between the grant of an estate burdened with a certain service, and the grant of an office, the performance of whose duties are remunerated by the use of certain lands. The *Sunnud* (he stated) appears to me most unmistakably to belong to the latter class.” He was of opinion, that there had been no previous grant, and that none was referred to in the *Sunnud*; the previous position of *Mahadeo* having been merely the usual one of Probationer. He observed, that there was no evidence that *Bhaugulpore ghatwallys* were “ordinarily descendible,” and thought that such descent rather depended on good conduct, and finally, the learned Judge, with much hesitation, arrived at the same conclusion as Mr.



Justice *Loch*, on which ground he too was of opinion, that the Plaintiff's suit should be dismissed.

Mr. Justice *Shumboo Nauth Pundit*, while in general terms saying that he would not have held that the Plaintiff could have resumed, even if the *ghatwally* services had determined, put his judgment on the same ground as Mr. Justice *Loch*.

The appeal was from this judgment of affirmance. The Government only appeared to support the High Court's judgment.

Sir *R. Palmer*. Q.C., Mr. *Doyne*, and Mr. *W. C. Mazúmdar*, for the Appellant.

It is an indisputable principle that a Purchaser at a sale for arrears of Government revenue has a right to revert to the state of things existing at the time of the Permanent Settlement, and to avoid all terms which the first *Zemindar*, under that Settlement, might at that earliest moment have avoided, *Mussamut Sona v. Rajah Neelanund Singh* (a); *Rajah Leelanund Singh v. Surwan Singh* (b). The High Court ought, therefore, to have held that the Appellant was legally entitled to resume this *ghatwally* tenure. The judgment of the Chief Justice proceeds upon an assumption that the lands were the same as those granted to *Mahadeo*, and that the conditions of holding were the same; whereas the condition was entirely altered by a succession of different arrangements of a variable nature entered into at the discretion of the Employer of the *Ghatwal*, or as a matter of temporary contract. Again, it was an error of law to raise an implication of an intention to confer a heritable title. The *Sunnud* produced only gave a life estate to the then *Ghatwal*, and, consequently, it was resumable

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(a) 5 W. R., 290.

(b) *Ibid.* 292.



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on the death of the Grantee. If by such usage it was intended, that what passed between the year 1743 and the time of the Decennial Settlement, there could be none such where the *ghatwally* tenure altered so materially, as to be used as evidence against the Appellant, whose title and rights relate back to the time of that Settlement, and who is not prejudiced or affected by the discretion or laches of any previous *Zemindar*. If the Government had at any time since the Permanent Settlement a right to the *ghatwally* services, it is clear that it has long since been waived, such *ghatwally* services having been dispensed with, and Government have now no legal right to insist on the appropriation of these particular lands to *ghatwally* services, or to the employment in such services by the families of the original *Ghatwal*, *Forbes v. Meer Mahomed Tuquee* (a), and the cases there cited (b). *Ben. Reg.* VIII. of 1793, sect. 41. The exceptions in the Act, No. XI. of 1859. sect. 37, do not embrace a service tenure like the present suit, but, as held by the majority of the Judges of the High Court, who expressed an opinion on that point, are applicable only to tenures rendering money rents, being of the nature of incumbrances, which a service tenure would not necessarily be.

Mr. *Forsyth*. Q. C., and Mr. *Pontifex*, for the Government.

First, until the Government renounces its claim to *ghatwally* services, the Appellant is not entitled to resume this *ghatwally* tenure; the *Ghatwal* being liable on pain of forfeiture to perform his services. Secondly, the tenure is not such as the Appellant, an auction Purchaser, is entitled to annul.

(a) 13 Moore's Ind. App. Cases, 438.

(b) *Ibid.* 451.



The Right Hon. Sir JAMES COLVILE :—

This is a suit brought by an auction Purchaser to resume possession of certain villages held under the tenure known as the *ghatwally* tenure. It does not appear to be an ordinary suit for resumption and reassessment; for the Plaintiff claims a right to the possession of the land from the date of the auction sale, with mesne profits from that time; but the substantial question raised in the suit is, whether the Appellant, as auction Purchaser, having acquired the rights of the *Zemindar*, with whom the original Settlement was made, is entitled to resume and put an end to the *ghatwally* tenure. It has been found as a fact by the Courts below (and their Lordships must assume that finding to be correct), that this tenure existed in its present form before the Decennial Settlement. The original *Sunnud* granting the *ghatwally* tenure is far more ancient. The first document produced goes back to the year 1743, and that *Sunnud* appears to refer to and recite a former *Sunnud*. There is no mention in this document of the rent reserved, but there does appear to their Lordships to be, as there appeared to the Judges of the High Court to be, on the record, proof that the rent payable in respect of these *Mouzahs* at the date of the Decennial Settlement, was the present rent of Rs. 61. The auction Purchaser, therefore, coming in by virtue of the sale, would appear to have no right to disturb this tenure in the way in which an auction Purchaser can sweep away incumbrances created since the Decennial Settlement. The only advantage which he gains by the character of being auction Purchaser is, that he is relived from any difficulty arising from the

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law of limitation, and that he is not conclusively barred by the acts or the omissions of the former *Zemindars*, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the *Zemindary*. It would seem, therefore, that if he has any right at all to destroy the tenure, it must be by virtue of that clause which has been cited from Reg. VIII. of 1793, sect. 41, relating to *Chakeran* or service lands. That enactment does not seem to have been much discussed below, but their Lordships fail to see upon what the title of the auction Purchaser can depend, if it does not depend upon that. Their Lordships further consider it to have been properly found by the Courts below that this tenure is an hereditary tenure. It is true that the *Sunnud* which is produced contains no words of inheritance, but it is in their Lordships' knowledge that before the acquisition of the *Dewanny*, before the British power became the ruling Power in *India*, it was extremely common where a tenure was in fact hereditary, when it practically passed as hereditary from Father to Son, to take out a new *Sunnud* upon each descent. Therefore, it appears to their Lordships, (and they are under the impression that it has been so decided here (a), as it appears to have been decided in the High Court), that the omission of words of inheritance does not show conclusively that the *Sunnud* was not hereditary. Then there is the strongest possible evidence that these tenures have descended from Father to Son; that they have, in fact, been hereditary; and their Lordships are, therefore, of opinion,

(a) See *Rajah Suttosurrun Ghosal v. Moheshchunder Mitter*, 12 Moore's Ind. App. Cases, 263.



that the conclusion to which the High Court came upon that point was correct.

The question, then is, whether, upon the suggestion that these *ghatwally* services have ceased to be necessary, the *Zemindar* has a right to resume the lands, and to turn out the persons who have enjoyed them for such a long period of time. Now, their Lordships think that the principle which should govern this case is that which was laid down in the case of *Forbes v. Meer Mahomed Tuquee* (13 Moore's Ind. App. Cases, 438), which has been referred to. They concur in the view entertained by the Chief Justice, and, in fact, by all the Judges who sat with him, that, under the circumstances of this case, the right does not accrue to the *Zemindar* on the mere suggestion that the services have ceased or that they are no longer necessary. They are by no means prepared to say, that if the Government, who had clearly a joint interest with the *Zemindar* in the continuance of the services when necessary, were not here disputing the *Zemindar's* right, that the *Zemindar* would, as between him and the *Ghatwal*, have any right so to resume the land; they are disposed to think that, upon the principle laid down in the case just referred to, that right would not exist. The case which has been cited in support of a right so to dispossess the *Ghatwal* is a case decided on the 5th June, 1866, the case of *Rajah Neelanund Singh v. Srwun Singh* (5 W. R. 292). That case was decided by two of the learned Judges who sat in the High Court in the case now under appeal, Mr. Justice *Kemp* and Mr. Justice *Jackson*, who seem to have considered that the land being held in lieu of wages and on a *quasi* contract for services, the *Zemindar* was at liberty

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to determine the tenure when the services were no longer required. In the case, however, the *Ghatwals* were said to hold the land, not under a *Sunnud* conferring an hereditary and indefeasible right, but "on the payment of a quit-rent, with enjoyment of the profits of the land in lieu of wages, and possession, however long, would not entitle them to hold the land at a fixed *jumma*, or to retain a portion of the land after they have ceased to perform the duties for which the land was assigned to them." It would appear, therefore, that the particular tenure there in question was very different from the present tenure. If it were of the same nature, it is clear that the two learned Judges who decided that case have departed from their former opinion, since they have concurred in the judgment now under appeal. Mr. Justice *Jackson* indeed differed from the rest of the Court as to the conclusion that the tenure was hereditary,—he did not think that the evidence was sufficient to make that out,—but in all other respects he joined with his Brethren in pronouncing the judgment now under appeal. It seems to their Lordships, that they would be taking upon themselves a very great responsibility, if, upon a question of this kind, a question of tenure peculiar to *India*, and upon which the judgment of Indian Courts is so valuable, they were to overrule the unanimous and carefully considered judgment of a full Bench of the High Court, particularly when that judgment appears to them to be entirely consistent with the general principles of justice and equity. They must, therefore, humbly recommend Her Majesty to dismiss this appeal with costs.

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WILLIAM FARQUHARSON

Appellant,

AND

DWARKANATH SING and the } Respondents.\*  
GOVERNMENT OF INDIA ... }

*On appeal from the High Court of Judicature at  
Fort William, Bengal.*

THIS was a suit for possession and enhancement of rent brought by the Plaintiff, *Erskine*, the *Putneedar*, against the Respondent, *Dwarkanath Singh*, the *Ghatwal*, and the Government, on the ground of encroachment of lands in his *Talook* not held *ghatwally*.

The question in the case was whether the Respondent, *Dwarkanath Singh*, the *Ghatwal*, and entitled as such to certain *ghatwally* lands within the Appellant's *Putnee Talook*, held lands in excess of what he was entitled to, and was liable to pay rent in respect of such excess to the Plaintiff, *Erskine*, the *Putneedar*.

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

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Suit by an Auction Purchaser of a *Putnee*, sold under Ben. Reg. VIII. of 1819, for possession of 3,000 *beegahs* of land within his *Putnee*, and to enhance the rent against a *Ghatwal*, and the Government charging encroachment against the *Ghatwal* beyond the quantity of

100 *beegahs* held *ghatwally*, according to a return made by a former *Ghatwal*. The only evidence of encroachment consisted of the *Isumnovisee* returns made by the *Thanadars* to the Magistrates in the years 1811, 1812, 1813, from which it appeared, that the quantity of land the then *Ghatwal* held *ghatwally* was 100 *beegahs*. Held, that the evidence of the Defendants of long-interrupted possession of the 3,000 *beegahs*, presumably before the Decennial Settlement, outweighed the effect of the *Isumnovisee* returns, which were, though *prima facie*, not conclusive evidence of the quantity of the land held *ghatwally*; and further that, though such return was not objected to by the then *Ghatwal*, it did not affect the right of the *Ghatwal* in possession.



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for the lands which the Respondent, *Dwarkanath Singh*, alleged he held *ghatwally*. The Courts below held, that the Plaintiff had failed to show such holding was in excess, and the correctness of that finding turned in the present appeal mainly upon their value as evidence against the Respondent, the *Ghatwal*, of certain Police returns, called *Isumnovisee*, relating to the *ghatwally* lands, and that point was the sole question argued on the appeal.

The Plaintiff, *Erskine*, since deceased, and represented by the Appellant, his Executor, became in *May*, 1852, the Purchaser, at a sale for arrears of rent under *Ben. Reg. VIII.* of 1819, of the *Putnee Talook* of *Baesgram*, within the *zemindary* of the *Maharajah* of *Burdwan*, comprising  $38\frac{1}{2}$  *Mouzahs*, of which the village *Desoodya*, in which the *ghatwally* lands of the Respondent, *Dwarkanath Singh*, the *Ghatwal*, was one. On enquiry as to the holding of the *Ghatwals* within his purchased *Putnee*, he considered that the *Ghatwals* had largely encroached beyond the limits of their original grants on the other lands of the respective villages. The Respondent was in possession of the entire lands of Plaintiff's village *Desoodya*, stated to be about 3,000 *beegahs*, held at a rent of Rs. 51-8, while the returns, the *Isumnovisee*, by the *Thanadars*, or Police establishment, to the Magistrates, showed that his Father, *Ram Singh*, to whom he succeeded as *Ghatwal*, had been returned in the years 1811, 1812, 1813, as the holder of only 100 *beegahs*. These returns showed similar alleged encroachments on the part of various other *Ghatwals*, and the Plaintiff called on them to come and settle and pay a rent for the excess lands. This they refused to do, and the consequence was the institution of this suit and eleven



others, which were all tried along with the present case in the Courts below upon the same evidence. The other suits being under the appealable value, were, therefore, not appealed from.

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The plaint in this suit was filed by *Erskine* against *Dwarkanath Singh*, as *Ghatwal* of *Ghat Desoodya*, and the Government. In form, the plaint was for possession of the excess lands, on the ground that the first Defendant had got possession by encroachment and refused to pay rent for them. But the suit appeared to have been afterwards framed into an enquiry, whether the Respondent as *Ghatwal* had encroached, and to what extent, and also what rent he should pay for the alleged excess. The plaint contained an allegation that the principal Defendant had been appointed as the head *Ghatwal* in the place of his Father, *Ram Singh*, the former head of the *ghat* of the village *Desoodya*; that *Ram Singh* filed an *Isumnovisee* in the *Foujdary Adawlut*, in the year 1811, stating the quantity of his *ghatwally* lands to be 100 *beegahs*, yielding a *punchuck jumma* of Rs. 51-8; that the first Defendant had no right to any other land in the *Mouzah Desoodya*, except those 100 *beegahs*, and that he had been in possession of the *mal* lands, to which he had no right, in excess of the quantity mentioned in the *Isumnovisee*. This return was filed with the plaint.

The first Defendant, by his statement or answer, contravened the effect of the *Isumnovisee* of the year 1811, in respect to the *ghatwally*; and submitted, that the boundaries of the lands and the quantity, with the length and breadth thereof, had not been truly stated in the *Isumnovisee*. That the *Isumnovisee* was prepared at one time, and a map recently,



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and that they did not agree with each other. That the *Isumnovisee* filed by the Police *Amlah* did not bind him, the present *Ghatwal*, and he disputed the claim as improperly brought, as except as a suit for enhancement of rent, under the Act, No. X. of 1859, it could not be tried in a Civil Court.

The Government, in their answer sustained the first Defendant's case, relying upon to judgments of the *Sudder* Court, delivered in the years 1817 and 1829.

The principal evidence of the Plaintiff consisted of the *Isumnovisee* papers or returns by the *Thanadars* to the Magistrates, dated in the years 1811, 1812, and 1813, in which the *Thanadars* returned the Defendant's *Ghatwal* as containing only 100 *beegahs*.

After an interelocutory decision by the Civil Court Judge of *West Burdwan*, and a remand of the case by the High Court, Mr. *W. T. Tucker*, the Judge of that Court, who re-tried the case gave judgment on the 23rd of *October*, 1865, holding that the *Isumnovisee* papers were not to be relied on, and that the Plaintiff had failed to establish his claim.

Against this decision an appeal was brought to the High Court, in which the same grounds were urged as contained in the allegations in the plaint. The High Court, consisting of the Justices *Bayley* and *Markby*, on the 23rd of *July*, 1867, dismissed the appeal on the ground that the Plaintiff had failed to establish his claim (a).

The appeal was from this decree. The Respondent, *Dwarkanath Singh*, did not appear, but the Government appeared to support their interest and that of the *Ghatwal*.

(a) See *Erskine v. Manik Singh Ghatwal*, 6 W. R., 10, and *Erskine v. The Government*, 8 W. R., 232.



Sir *R. Palmer*, Q. C., and Mr. *Doyne* for the Appellant, contended,

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First, that the *Isumnovisee* of 1811 was admitted by the Respondents, and established in evidence with those also of 1812 and 1813, as to the quantity of *ghatwally* lands being 100 *beegahs* only to which the Respondent's Father was then entitled; and secondly, that in the absence of any evidence or well-founded explanation by the first Respondent as to how his Father became legally possessed of the excess lands constituting 3,000 *beegahs*, such statement was conclusive as to the right of the Appellant, as auction Purchaser, under *Ben. Reg. VIII.* of 1819, sect. 11, to receive a fair rent for such excess from the first Respondent, the *Ghatwal*.

The cases of *Rajah Lelanand Sing, Bahadoor v. The Government of Bengal* (a); *Mahbub Hossein v. Patasu Kumari* (b); and *Raja Lelanand Singh Bahadur v. The Government* (c), were referred to.

Mr. *Forsyth*, Q.C., and Mr. *H. C. Merivale*, for the Government, were not called on.

The Right Hon. The Lord Justice MELLISH:—

This is a suit for ejectment which was brought to recover, nearly 3,000 *beegahs*, of land.

The Plaintiff was the Purchaser of a *Putnee* under a sale for non-payment of the rent of the *Putnee*, and claimed that under the *Ben. Reg. VIII.* of 1819, section 11, having purchased the *Putnee* in such cir-

(a) 6 Moore's Ind. App. Cases, 101.

(b) 1 Ben. Law Rep. 120.

(c) 2 Ben. Law Rep. 114.



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cumstances, he was entitled to set aside all estates which had been created after the origin of the *Putnee*, and to recover all the lands which were originally part of the *Putnee*. However, it appearing, that the first Defendant had been in possession of those lands for a very long time, admitting that Defendant's possession of the lands, the Plaintiff afterwards sued for a right to increase the rent, and have a proper rent payable to him out of the land.

The evidence which the Plaintiff produced in support of his case entirely consisted of three documents. At first only one document was produced, which was an *Isumnovisee* of the year 1811. Subsequently, two other documents were produced, which appear to be returns made by the Police, and there appears to be evidence to show that they are made generally on the information of the *ghatwally* holder, stating his name, the quantity of land which he held, and the *Putnee* rent which he pays for it; and it appears, in one of the returns for these three years, that the then holder of the estate which the first Defendant now holds, the *ghatwally* holder had returned that the quantity of his land was 100 *beegahs*. That was the sole evidence of the Plaintiff. He did not produce any evidence at all to show how it happened that if 100 *beegahs* was all that the *ghatwally* holder was entitled to in the years 1811, 1812, and 1813, that quantity of 100 *beegahs* had increased to the very large quantity of 3,000 *beegahs* at the time when the sale took place. On the other hand, the first Defendant produced evidence to show that as far back as living memory went, the whole quantity of 3,000 *beegahs* had been held. He produced one Witness of 80 years old, and another of



75 years old, who had known the land all their lives, who said that the *ghatwally* holder had held the whole 3,000 *beegahs* during all the time that they remembered the property. Both the Courts below believed those Witnesses, there being no evidence whatever to contradict them, and thought that for sixty years the land had been so held. Then the question rose as a simple question of fact before the Courts below, taking the evidence on both sides, whether they ought to find that the original estate of the *ghatwally* holder consisted of 100 *beegahs* only, or of 3,000 *beegahs*. Both the Courts below found, as a matter of fact, on this evidence, that the original *ghatwally* consisted of that number of *beegahs*, and that, therefore, the Plaintiff was not entitled to maintain this suit.

Their Lordships entirely agree with those decisions. Not only does this case come within their ordinary rule that on a mere question of fact where both the Courts below have agreed and where there has been no mistake in point of law, they will not reverse the decisions of the Courts below, unless they can see that those decisions are clearly wrong, but their Lordships come to the same conclusion. It appears to them that weight must be given to ancient possession, and that there may be a variety of causes why incorrect returns may have been made in the years 1811, 1812, and 1813. It may have been that the Police Officer was careless and did not care about what he returned, or it may have been that the *ghatwally*-holder at that time had some reasons for giving incorrect information, or possibly it may have been that the ancient *Ghatwals* originally held only 100 *beegahs* but that the estate had increased to 3,000 *beegahs* many years before and before the

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creation of the *Putnee*, which notwithstanding the *Ben. Reg.* VIII. of 1819 would entitle the *ghatwally*-holder to hold the whole quantity. But whatever the reason may have been, their Lordships are of opinion, that the long uninterrupted possession of the *ghatwally*-holder ought clearly to have greater weight than those returns. Upon those grounds, therefore, they think that the judgment of the Court below must be affirmed.

With respect to the cases which have been referred to, all that they really show is this, that different Courts at different times have given greater or less weight to those returns. All the Courts agree that they are admissible in evidence, and they have been admitted in evidence in this case. In each particular case the Courts have considered what weight ought to be given to them, and it is nothing very surprising if the Courts at different times have not given exactly the same weight to those documents. Their Lordships are of opinion, that the Courts in this particular case have given quite as much weight to these returns as they deserve.

Their Lordships will, therefore, humbly recommend to Her Majesty that this appeal be dismissed with costs.

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THOMAS NEWTON

... Appellant,

AND

THE HON. C. A. TURNER, R. SPAN-  
KIE, and G. D. TURNBULL, Puisne  
Judges of the High Court, North-  
Western Provinces. } Respondents.\*

*On appeal from the High Court, North-Western  
Provinces.*

THIS was an appeal from two Orders and judgments of the High Court, *Allahabad, North-Western Provinces*, dated the 13th and 27th August, 1870, whereby the Appellant, a Barrister-at-law, and an Advocate of the High Court of the *North-Western Provinces*, was suspended from practice for alleged professional misconduct, liberty being given to him to apply, at the expiration of five years, for permission to resume practice.

21st & 22nd  
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Two Orders of the High Court of the *North-Western Provinces* the one being an Order *nisi* calling on the Appellant, a Barrister and Advocate practising in that Court, to show cause why he should not be suspended from the practice

° Present :—Members of the *Judicial committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. Sir Montague Edward Smith

of his profession as an Advocate of that Court, and the other Order declaring him guilty of gross professional misconduct, and suspending him from practice for five years, on appeal, as to the rule on which the first Order was made discharged, and the second Order reversed; the Judicial Committee being of opinion that, though the Appellant had been guilty of a grave irregularity and deserving of censure, yet the facts proved did not amount to that *mala praxis* on which the High Court, having regard to the position and functions of an Advocate in the *North-Western Provinces*, could fairly found any proceeding of a penal character.



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The circumstances under which the Order of the 13th of *August*, 1870, was made arose out of a communication by Mr. *Bramly*, the Officiating Judge of the *Allyghur* District, dated the 19th of *July*, 1870, to the Registrar of the High Court, *North-Western Provinces*, of proceedings held before him in consequence of two Letters addressed to him by the Administrator General of *Calcutta*, dated the 10th of *May*, and the 14th of *June*, 1870, regarding Mr. *Newton's* professional conduct in applying for letters of administration on behalf of a Mrs. *Saunders* to the estate of her late Son, when he knew she could not be entitled to such administration.

The Respondents, at that time the presiding Judges of the High Court, thereupon issued an Order and citation, dated the 30th of *July*, 1870, calling upon Appellant to give explanation, on the 13th of *August*, 1870, with reference to the imputations on his professional conduct, as alleged against him by Mr. *Bramly* in the communication above mentioned.

The Appellant, as directed, appeared in person on that day, and read out from a written statement, which he had verified, such explanation as he was able to afford, and which explanation was, to some extent, satisfactory, as he was relieved of one of the two charges contained in the citation of the 30th of *July*, 1870.

With reference to the other charge, the Respondent served the Appellant with a rule, dated the 13th of *August*, 1870, calling upon him to show cause why he should not be suspended from practice, and also as to certain other charges which were not contained in the citation of the 30th of *July*, 1870.



The Appellant appeared by Counsel on the 27th of *August*, 1870, who read from a written statement signed by the Appellant, but did not otherwise orally address the Court. The Appellant also filed affidavits in disproof of the allegations made against him; and the Respondents, constituting the Court, though they admitted having too hastily assumed certain matters against the Appellant, on the previous day of charge, declared that the Appellant had been guilty of gross professional misconduct, and passed an Order on the 27th of *August*, 1870, suspending him from practice for five years, with permission to apply for restoration to practice, if accompanied with certificates of character, at the expiration of such period.

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The facts of the case, as well as the Orders of the Supreme Court, fully appear in the judgment of their Lordships.

On the 5th of *January*, 1871, the Appellant presented a petition, accompanied with grounds of appeal, to the High Court, for leave to appeal to Her Majesty in Council, and the Court granted a certificate allowing such appeal.

Sir *R. Palmer*, Q.C., and Mr. *W. Bush Cooper*,  
 for the Appellant,

Contended, first, that as Mr. *Bramly*, the Officiating Judge of the *Allyghur* District, was fully competent to admonish the Appellant for any misconduct he might have conceived he had been guilty of at the time of such alleged misconduct occurring, and not having exercised such discretionary power, acted illegally in forwarding an *ex parte* proceeding to the High Court, reflecting on the Appellant's professional



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conduct, as set forth in the communication made by him on the 19th of *July*, 1870; that a High Court proceeding thereon had also acted illegally, especially in proceeding *ex mero motu* on such communication: *Emerson v. The Judges of the Supreme Court of Newfoundland* (a); and that the Order or citation, dated the 30th of *July*, 1879, being, therefore, illegally issued, all proceedings thereon were *ab initio* void: secondly, that the High Court acted illegally in proceeding *ex mero motu* as to the second rule or Order, dated the 13th of *August*, 1870, no one having applied for such rule, and all proceedings taken thereon were *ab initio* void; that the matters set forth in such second rule or Order of the 27th of *August*, 1870, being purely of a private character unconnected with the Appellant's professional duties, and regarding which no one had preferred any complaint, not even the Appellant's Client, Mrs. *Saunders*, the High Court's severe comments and Order were unmerited and illegally passed: and, lastly, that the misconduct imputed to the Appellant amounted at the utmost to an error of judgment or misconception of law, for which professional men are not subject to punishment.

Mr. *Shapter*, Q.C., for the Judges,

Objected to the competency of the appeal, on the ground that, as it was a criminal proceeding, the High Court had no jurisdiction to allow the appeal, referring to sect. 30 of the Letters Patent, 17th *March*, 1866, establishing the High Court in the *North-Western Provinces*. On the merits he commented on

(a) 8 Moore's P. C. Cases, 157.



*Emerson v. The Judges of the Supreme Court of Newfoundland* (a), and cited *In re Stewart* (b); *Ex parte Bayley* (c); *Lechmere Charlton's Case* (d); *Martin's Case* (e).

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Judgment was reserved, and now pronounced by

The Right Hon. Sir JAMES COLVILE :—

This appeal is brought by Mr. *Thomas Newton*, a Barrister-at-Law and an Advocate of the High Court of Judicature for the *North Western Provinces*, against two Orders of that Court, dated respectively the 13th and the 27th of *August*, 1870.

9th Dec.,  
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The particular terms of these Orders will be afterwards considered. It is sufficient for the present to state, that they were made in the exercise of the power vested in the Court by the 8th section of the Letters Patent constituting it; and that by the latest of them Mr. *Newton* was suspended from practising as an Advocate of the Court until the further Order of the Court. Liberty was at the same time given to him, at the expiration of five years from the date of the Order, to apply for permission to resume practice, which, on the production of satisfactory proof of good conduct in the meantime (it was said), would be conceded to them. The effect, therefore, of the Order was to suspend Mr. *Newton* from practising as an Advocate at the Court, certainly for five years, and possibly for a longer and indefinite period.

(a) 8 Moore's P. C. Cases, 157.

(b) 5 Moore's P. C. Cases (N. S.), 187; S. C. Law Rep. 2 P. C., 88.

(c) 9 B. & C., 691.

(d) 2 My. & Cr., 342.

(e) 2 Russ. & My., 674, n.



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The following are the proceedings which resulted in this suspension :—

On the 19th of *July*, 1870, Mr. *Bramly* the officiating Judge of *Allyghur* forwarded to the High Court a report of the proceedings in his Court on an application made by Mr. *Newton* on behalf of one Mrs. *Saunders* for letters of administration to the estate of her deceased Son, *Paterson Tandy Saunders*, imputing improper conduct to Mr. *Newton* in that matter, and submitting to the Court whether such conduct was becoming a Barrister. The precise nature of the charges against Mr. *Newton* will appear from the next proceeding.

On the receipt of this communication the High Court passed an Order, dated the 30th of *July*, 1870, calling upon Mr. *Newton*, on the 10th of *August* following, to answer the matters stated in Mr. *Bramly's* Letter and report, whereby it had been brought to the notice of the Court that he, *Thomas Newton*, had been guilty of grossly improper conduct in that, whilst acting as Counsel for one Mrs. *Saunders*, on application to Mr. *Bramly* for letters of administration of the estate of her deceased Son to be granted to her, he, well knowing the said Mrs. *Saunders* not to be the administratrix of the deceased *Paterson Tandy Saunders'* estate, obtained from the said Mrs. *Saunders*, and indorsed and put in circulation, a Government loan note for the sum of Rs. 3,000, belonging to the estate of the said *Paterson Tandy Saunders*, and also certain other Government loan notes the property of the said estate, the said Government notes having been indorsed by Mrs. *Saunders* as Administratrix, although the said *Thomas Newton* was well aware that administration of the estate and



effects of the said *Paterson Tandy Saunders* had not been granted to the said Mrs. *Saunders*; whereby also it had been brought to the notice of the Court that Mr. *Thomas Newton* had been guilty of grossly improper conduct in the discharge of his professional conduct as an Advocate in having wilfully deceived the said Mr. *Bramly* in the course of the hearing of the said application for Letters of administration, by informing him, on or about the 9th of *July*, 1870, that he was greatly surprised to hear that the said *Paterson Tandy Saunders* was illegitimate, whereas he, the said *Thomas Newton*, was well aware of the illegitimacy of the said *Paterson Tandy Saunders*, with some circumstances of aggravation concerning this latter charge which it is unnecessary to state.

Mr. *Newton* appeared before the Court under this Order, and made a verbal statement in explanation of both charges; evidence was taken, and a number of Letters were produced in the course of the inquiry. On its termination the Court acquitted Mr. *Newton* of the second charge, but pronounced his explanation in respect of the first to be unsatisfactory, in terms which will be afterwards considered; and, having commented on his conduct in respect of various new matters which had come out in the course of the inquiry, and on the perusal of the Letters produced, determined to take further proceedings against him. The result was that, on the 13th of *August*, 1870, an Order, being the first of those under appeal, was drawn up in the following terms:—

“In the matter of *Thomas Newton*, an Advocate of the Court. It appearing to the Court that the above-mentioned *Thomas Newton*, an Advocate there-

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of, has been guilty of grossly improper conduct in the discharge of his professional duty as an Advocate in procuring his Client, *Catherine Saunders*, to indorse, as 'Administratrix to *Paterson Tandy Saunders*' estate,' three Government promissory notes, of the aggregate value of Rs. 14,000, or thereabouts, viz., No.  $\frac{000647}{9478}$  of 1854-55, for Rs. 1,000; No.  $\frac{202130}{5835}$  of 1856-57, for Rs. 10,000, both bearing interest at 5 per cent.; and No.  $\frac{001785}{1346}$  of 1859-60, for Rs. 3,000, bearing interest at ( $5\frac{1}{2}$ ) five and a half *per cent.*, and belonging to the estate of *Paterson Tandy Saunders* deceased, he, the said *Thomas Newton*, well knowing that the said *Catherine Saunders* was not the Administratrix of such said estate, and in indorsing and putting in circulation one of the said notes to wit the Government promissory note No.  $\frac{001785}{1346}$  of 1859-60, for the sum of Rs. 3,000, bearing interest at  $5\frac{1}{2}$  per cent. And also in drafting a certain Letter, dated on or about the 14th day of *April*, 1870, and in procuring the same to be copied by one *Maria Hill*, and signed and sent by the said *Catherine Saunders* to the firm of *Gillanders, Arbuthnot, & Co.*, of *Calcutta*, which said Letter contained a statement, or introduction, in the words following to wit:—  
 'With reference to your kind offer to advance money for the coming Indigo season,' which statement or introduction was known to the said *Thomas Newton* to be false, and inserted with the intention of inducing the said firm of *Gillanders, Arbuthnot, & Co.*, to advance for the manufacture of indigo certain moneys, and with the intention of procuring the said *Catherine Saunders* to pay to him the said *Thomas Newton* of the moneys if and when so advanced a sum or



sums of money on account of his fees as an Advocate, and also in procuring employment as an Advocate, by means of a threat contained in a certain Letter written and sent by the said *Thomas Newton* to the said *Catherine Saunders*, and dated on or about the 27th day of *January*, 1870, in the words following, to wit:—‘If I do not appear for you, I fear the result, as I know all the particulars; and recollect, if the answer is not properly put, you may lose all you have.’ And generally in his behaviour and conduct in connection with his employment as an Advocate by the said *Catherine Saunders*, at divers times in the months of *January*, *February*, *March*, *April*, *May*, *June*, and *July*, 1870. Now, the said *Thomas Newton* is hereby ordered to attend at the sitting of this Court, to be held at the Court House, *Allahabad*, on Saturday, the 27th day of *August* instant, at eleven of the clock in the forenoon, to show cause why he, the said *Thomas Newton*, should not be suspended from the practice of his profession as an Advocate of this Court within the jurisdiction of this Court.”

Mr. *Newton* duly appeared to show cause against this rule; and, on the 27th of *August*, 1870, the Court gave final judgment. It acquitted Mr. *Newton* on all but the two first charges, viz., the imputed misconduct in inducing Mr. *Saunders* to indorse the Government notes; and the imputed misconduct in causing her to write the Letter to *Gillander Arbuthnot*, & Co.; and finding that these two charges had been wholly or in part established against him, passed the Order of suspension, which is the second of those under appeal.

Exception was taken at their Lordships’ Bar to this

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course of procedure. It was argued first, that the Order of the 30th of *July*, 1870, was objectionable, inasmuch as it prejudged the Appellant's case by assuming that he "had been guilty of grossly improper conduct." Their Lordships, however, are of opinion that, although this Order may not have been very happily worded, the true construction of it is, that Mr. *Newton* was thereby merely called upon to answer the matters stated in Mr. *Bramly's* Letter and report ; such matters being, for the sake of convenience, reduced into the two formal charges of professional misconduct set forth in the Order ; and that there was no intention on the part of the Court to prejudge the case, or to prevent Mr. *Newton* from having the full benefit of any explanation of the matters charged, which he might be able to offer. That this was so, is shown, their Lordships think, by the subsequent proceedings.

It was next objected, that the Judges improperly placed themselves in the anomalous position of being at once Accusers and Judges ; and that they ought to have committed the conduct of the proceedings against Mr. *Newton* to some third person. And in support of this latter proposition, the case of *Emmerson v. The Judges of the Supreme Court of Newfoundland* (a), was cited. In that case, whilst litigation between an Attorney with his former Client was still in some sort pending, though after payment under protest of the sum claimed, the Court, of its own mere motion, and not on the application of the opposite party, and without previously calling upon the Attorney to explain his conduct, served him with a notice to show cause within four days, why he

(1) 8 Moore's P. C. Cases. 157



should not be struck off the Rolls, and refused to enlarge the rule, and give him further time to prepare his defence; and on his failing to show cause within the four days, made the rule absolute. It is obvious, that several of the circumstances which induced this Committee to reverse that Order, do not exist in the present case. It is, however, undoubtedly true that, in delivering their Lordships' judgment, Lord *Kingsdown* said, that an explanation should have been required; and that upon that explanation proving insufficient, "the proper course would have been that some person should have been instructed on behalf of the Crown, to apply to the Court for a rule for this Gentleman to show cause why further proceedings should not be taken (a).

Looking to the substance of the objection as applicable to this case, their Lordships think, that there is a broad distinction between the charges originally brought by Mr. *Bramly*, and those made for the first time by the Order of the 13th of *August*, 1870.

The High Courts in *India* exercise peculiar powers of superintendence and control over the subordinate Courts, and the proceedings therein. It was, their Lordships apprehend, in the regular course of practice that Mr. *Bramly* should make the report which he did make of the proceedings in his own Court; and that he should complain, if he had ground of complaint, to the High Court of the supposed *mala praxis* of a Practitioner over whom he had no direct power; but who, by virtue of being an Advocate on the Rolls of the High Court, had the right of appear-

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ing in the Lower Court; and their Lordships are of opinion, that the High Court was perfectly justified in taking action on the report and complaint, by calling upon Mr. *Newton* to explain his conduct.

Whether it would not have acted more regularly if it had placed the conduct of the further proceedings against Mr. *Newton* in the hands of a third party, is another question. But the Judges have stated that they had not the means of doing so, and their Lordships must accept that statement; and they are disposed to think that even on the authority of the case cited, the omission to do this is not a fatal objection to the subsequent proceedings.


Their Lordships, however, cannot but regret that the learned Judges of the High Court, acting on Letters which came to their knowledge in the course of the first inquiry, should have thought fit, on the instant and without further inquiry, to frame new charges against Mr. *Newton*, and thus assume the functions of Accuser and Judge. A very strong and clear case may arise, in which such a course would be justified. But the inconvenience of it is great; and the more manifest in the present case, inasmuch as the learned Judges found themselves obliged, in all but one instance, to abandon the charges which they themselves had on the first impression suggested and framed.

Their Lordships have deemed it right to make these observations on the questions of form which have been raised before them. To decide, however, such a case as this upon a question of form, would be far from satisfactory; and they, therefore, proceed to consider it upon its merits.

They are relieved from the necessity of considering



any but the two charges upon which Mr. *Newton* was finally suspended. Of the second of the original charges he was acquitted on the first proceeding against him. Of all but two of the charges embraced in the Order of the 13th of *August*, 1870, he was also acquitted, the Court being of opinion that, though the conduct imputed to Mr. *Newton* by those charges may have been inconsistent with the rules and traditions which regulate the conduct of Barristers in this Country, and may not have been altogether unobjectionable even in *India*, it did not amount to that *malla praxis* on which the Court, having regard to the position and functions of an Advocate in the *North-West* Provinces, could fairly found any proceeding of a penal character.

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Their Lordships propose to deal first with the last of the two charges which the High Court thought were established against Mr. *Newton*, viz., that of having counselled Mrs. *Saunders*, to write to Messrs. *Gillanders, Arbuthnot & Co.*, the Letter of the 14th of *April*, 1870.

The facts admitted or proved concerning this Letter are as follows :—

Mrs. *Saunders* was a native woman who, after cohabiting for several years with Mr. *George Saunders*, an Indigo planter, in the *Allyghur* District, had been married by him some time before his death. The date of this marriage is now ascertained to have been the 17th of *October*, 1856. Under the Will of her deceased Husband she seems to have been tenant for life of his Indigo Factory and other property. She had several children by him, born either before or after the marriage. One of them was a Son, *Pater-son Tandy Saunders*, who, under his Father's Will,



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or otherwise, was possessed of several Government notes aggregating Rs. 14,000. Another was a daughter who had been married first to a person of the name of *Nichterlein*; and afterwards, after having been sued by him for breach of promise of marriage, to a Mr. *Kelly*. *George Saunders* had been indebted to Mr. *Nichterlein's* estate, which was in the hands of the Administrator-General. Mrs. *Nichterlein*, before her second marriage, had made a gift of her share of this debt to her Mother, or to her Father's estate; but this gift was disputed by her second Husband; and the original debt, and the effect of Mrs. *Nichterlein's* gift, appear to have been, at the beginning of 1870, subjects of pending or contemplated litigation. Mrs. *Saunders* had likewise a cross claim against *Nichterlein's* estate for the proceeds of indigo of a former season.

On the 15th of *December*, 1869, *Paterson Tandy Saunders* died, under age and unmarried. Shortly after his death, and on the 10th of *January*, 1870, Mr. *Newton*, who had acted in at least on lawsuit on behalf of Mr. *George Saunders*, and appears to have kept up friendly, relations with the family, wrote to Mrs. *Saunders* condoling with her on the death of her Son, and volunteering, if he were not then retained, to act for her in that matter, some advice concerning the litigation between her and the Administrator-General.

It further appears, that she was then pressed for money, and that she required funds both for the purposes of the Indigo Factory, and for carrying on the suits pending or about to be commenced, and that in respect to the latter Mr. *Newton* was to receive certain fees. In these circumstances she, under the



advice of Mr. *Newton*, wrote and sent to Messrs. *Gillanders, Arbuthnot, & Co.*, Merchants of Calcutta, the following Letter:—" *Coel Factory, Allyghur*, 14th April, 1870. Dear Sirs,—With reference to your kind offer to advance money for the coming Indigo season, I write to inquire whether you would place at my disposal Rs. 30,000. On hearing from you I will commence my Indigo advances."

On the first inquiry, that of July, 1870, it came out on the evidence of Miss *Hills*, the Governess and amanuensis of Mrs. *Saunders*, that if any money had been received from *Gillanders, Arbuthnot, & Co.*, Mr. *Newton's* fees would have been paid.

Messrs. *Gillanders, Arbuthnot, & Co.*, however, declined to make any advance, and nothing came of the application to them.

The Judges of the High Court, nevertheless, saw fit to make this transaction matter of charge against Mr. *Newton*. The view of it which they took when they framed the charge in respect of it, which is contained in the Order of the 13th of August, 1870, was thus stated by the acting Chief Justice:—" Again you induced an uneducated woman whom you were advising, whether wisely or unwisely matters not, to carry on certain litigation, whereby you hoped to secure to yourself, what I must call, under the circumstances, the exorbitant fee of Rs. 3,800, to write to a *Calcutta* firm a Letter drafted by you, containing a false assertion, whereby that firm was to be induced to advance to Mrs. *Saunders*, for the purposes of her Indigo Factory, certain moneys, and which moneys that firm would naturally consider was to be employed for the legitimate purposes of the Factory, whereas a large portion was to be paid to you for the

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purposes of carrying on litigation. It is abundantly clear that *Gillanders, Arbuthnot, & Co.*, had never promised to advance moneys to Mrs. *Saunders*. That Lady, from her manner to-day, we cannot doubt, had never heard their names before. The Court cannot but come to the conclusion that the statement made in the Letter to *Gillanders, Arbuthnot, & Co.*, as to their previous offer of assistance, was, to your knowledge, false, and that it was made for the purpose of obtaining money to pay your fees."

When, however, cause was shown against the rule, it came out that Mrs. *Saunders*, so far from having never heard the names of Messrs. *Gillanders, Arbuthnot, & Co.*, had been in correspondence with them at various times between the years 1866 and 1870, and had had various business transactions with them. It was further urged, that the assumption that *Gillanders, Arbuthnot, & Co.* had offered to advance money to Mrs. *Saunders*, if erroneous, had deceived, and could deceive, nobody. And the High Court in its final judgment of the 27th of *August*, 1870, expressed its willingness to assume "That it was from information given him by Mrs. *Saunders*, that he (Mr. *Newton*) introduced the passage relating to a former offer of advances." The gist, therefore, of the offence imputed to Mr. *Newton* in respect of this transaction is reduced to this, viz., that he, knowing that a portion of the moneys to be received from *Gillanders, Arbuthnot, & Co.* was to be employed in payment of his fees, drafted for his Client a Letter calculated to induce the firm to believe that this advance was sought for a different purpose. It appears to their Lordships, after carefully considering all that is said of this matter in the final judgment of the High



Court, that the harsh view of the transaction there taken is not borne out by the facts, and that the drafting of the Letter cannot be taken to constitute such grave professional misconduct as would justify any part of the severe sentence passed on Mr. *Newton*. The Letter is an application in the most general terms from an Indigo planter for an advance of money for the coming season. It is clear that Mrs. *Saunders* did want money for the purposes of her Factory. Their Lordships are not aware that such an application implies any undertaking that the money if advanced is to be ear-marked; is not to be mixed with the general funds of the Planter; and that no part of it is to be withdrawn, even temporarily, and applied to a purpose other than the cultivation or manufacture of Indigo. If the lender chooses, he can of course take any security or guarantee he may think necessary, in order to have the money set apart and applied entirely to the purpose of producing the crop on the security of which he makes the advance. But here the loan was declined. All that is established is, that Mrs. *Saunders*, pressed for money to provide both for carrying on her Factory, and for the prosecution of a suit in which she may well have hoped to recover further funds, wrote this Letter under Mr. *Newton's* dictation, meaning to apply part of the money in the first instance to the payment of his fees in the suit. Looking to all that is established in respect of this Letter, and to the absence of any complaint on the part of any person concerning it, their Lordships are of opinion, that the Order against Mr. *Newton* cannot be maintained on this charge.

They next proceed to consider the graver charge

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against him of having induced or advised his Client to indorse the Government notes as Administratrix of *Paterson Tandy Saunders*, when she was not entitled to assume that character. The facts proved which particularly relate to this transaction are as follows:—

On the 5th of *April*, 1870, Mrs. *Saunders* wrote to Mr. *Newton* enclosing one of the notes belonging to that estate of *Paterson Tandy Saunders*, and standing in his name, being a note for Rs. 10,000, and asking him to get the note renewed in her name, and broken up into ten notes for Rs. 1,000 each. On the 9th of *April*, 1870, Mr. *Newton* wrote to Mrs. *Saunders* to the effect that he had spoken to Mr. *Clarke*, the Treasury Officer at *Allyghur*, who had informed him that the note could not be renewed, nor interest paid upon it, until she had taken out administration to her Son's estate. Thereupon Mr. *Newton* was instructed to make, and did make, as Counsel for Mrs. *Saunders* in Mr. *Bramly's* Court, the application for Letters of administration to the estate of her deceased Son, describing him as a British subject who had died a minor and intestate. The date of this application was the 2nd of *May*, 1870. On the 6th of *May*, the day before the usual citations were issued by the Judge, Mr. *Newton*, who had advanced some small sums to Mrs. *Saunders*, received from her the security for Rs. 10,000 and two other Government notes standing in *Paterson Tandy Saunders'* name, and part of his estate, all being indorsed by her as Administratrix of that estate. At the same time she executed to him a receipt admitting the loan of Rs. 200, and he executed to her a receipt for the notes; and Miss



*Hills*, in her account of the transaction, has deposed as follows : " Mr. *Newton* wrote the indorsements in pencil on the notes, and told me to write it small on the pencil marks ; and I said at the time, ' Mrs. *Saunders* has not got the administratrixship, how can I write that ? ' and he said, ' Whatever blame there is will fall on me.' I said nothing more. I then wrote the indorsements. Mrs. *Saunders* signed them."

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The indorsements were special to Mr. *Newton*. One of these notes, being one for Rs. 3,000, he afterwards specially indorsed to the *Delhi* Bank, and that Bank having demanded in *Calcutta* a renewal of it, inquiry was made concerning the fact of the grant of administration to Mrs. *Saunders*, and so the transaction was brought to the notice of Mr. *Bramly*.

In the meantime a question had arisen in Mr. *Bramly's* Court touching the legitimacy of *Paterson Tandy Saunders*, and whether administration of his estate ought to be granted to Mrs. *Saunders* as his Mother and next of kin, or to the Administrator-General as representing the Crown. It appears to be now certain, that *Paterson Tandy Saunders* was born out of wedlock, but it is suggested on behalf of Mr. *Newton* that he might, nevertheless, as the Son of a Scotchman retaining his domicil though resident in *India*, have been made legitimate *per subsequens matrimonium*.

Their Lordships think that it is fortunate for Mr. *Newton* that the determination of this case does not depend upon this point. If it appeared that Mr. *Newton*, knowing that *Paterson Tandy Saunders* was born out of wedlock, had applied for Letters of administration as if the deceased had been born in



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wedlock, and, pending that application, had caused Mrs. *Saunders* to endorse these Bills in the character of Administratrix when she did not possess that character, and had attempted to raise money on them for Mrs. *Saunders*, in the expectation that he might ultimately succeed in showing that the *status* of *Paterson Tandy Saunders* was to be regulated by Scotch law, and that under that law, though born out of wedlock, he was legitimate, their Lordships are of opinion, that his conduct would have been almost without excuse. For the proof of legitimacy and of the right of Mrs. *Saunders* to administration, and to a beneficial interest in any part of her Son's estate, would in that case have depended on the determination of a disputable, and possibly, very nice question, viz. :—Whether Mr. *George Saunders*, if his domicil of origin were Scotch, had not lost that domicil, and acquired an Indian domicil by settling as an Indigo planter in *India* and there dying. In the cases of *Campbell v. Campbell (a)*, and *Munro v. Munro (b)*, one of the principal issues was, whether the Father of the person whose legitimacy was in question had retained his Scotch domicil. And in both cases the facts on which the issue was determined were very different from those on which the like issue would have been tried in the case of Mr. *Saunders*.

But, in truth, this was not the defence of Mr. *Newton* in the High Court, nor need it be his defence here. The case which he made there was, that when he first made the application for Letters of administration, and when he caused Mrs. *Saunders* to indorse


(a) Law Rep. 1 H. L., Sc., 182.

(b) 7 Cl. & F., 842.



the Notes, he did not know or believe that *Paterson Tandy Saunders* was born out of wedlock ; and, therefore, had good reason to believe that in a few days she would possess the character which the indorsement attributed to her. And this fact has been found in his favour by the High Court. On the occasion of the first hearing the acting Chief Justice says :—" When you procured your Client to sign the promissory notes as Administratrix, you doubtless were under the belief that she would at once get administration granted to her, and we, therefore, do not regard the act as so gravely criminal as it would otherwise have been. The opinion which we have formed on the second charge, which is made against you in the Judge's report, that you possibly were not aware that any impediment existed to the obtaining of the administration by your Client, enables us to assume in your favour that, when you procured your Client's signature as Administratrix, you believed that in a very short time she would be in a position legally to assume that character and make a good title to her Son's property."

If the High Court had found upon sufficient evidence that Mr. *Newton* had advised Mrs. *Saunders* to make the indorsements as Administratrix, knowing that she had no title, or doubtful title, to obtain the grant of letters of administration, their Lordships would have felt that the sentence upon Mr. *Newton* ought to be confirmed. But the finding of the High Court negatives this knowledge ; and upon this finding of the High Court, their Lordships feel that, although in this matter Mr. *Newton* has been guilty of a grave irregularity, which, in their opinion, is well deserving of censure, he has been acquitted of having

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acted with the *malus animus* which is a necessary ingredient in every fraudulent act, and, therefore, that his conduct, though censurable, does not bear the character which the heavy sentence passed upon him would stamp upon it. Their Lordships, therefore, however unwilling to weaken the hands of the Courts of *India* in representing professional misconduct and maintaining a high standard of honour amongst those who are admitted to practise before them, have come to the conclusion, that in this case, it is their duty humbly to advise Her Majesty to allow the appeal, and to reverse the last of the Orders against which it is brought, and that in lieu thereof to order that the rule to show cause of the 13th of *August*, 1870, be discharged. They do not propose to recommend the reversal of that Order, inasmuch, as such reversal would imply that no rule to show cause ought to have been made. They make no order or recommendation as to costs.

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In that case the Respondents, except *Kalidoss Chunder*, sued to recover possession of four-fifths of certain lands lying within the jurisdiction of the Civil Court of *Zillah Beerbhoom*, from *Hurreenath Roy*, the original Plaintiff in this suit, since deceased, the predecessor in estate of the Appellant and his lessees and the vendees of parts thereof, on the allegation that the lands though ostensibly given to the Father of *Hurreenath* for his own use by a petition executed in the *Beydi* year 1229, A.D., 1813, by five Brothers who then represented the joint family, had not in fact passed to him, but had continued to be joint down to the *Bengali* year 1245, A.D., 1820, when a second partition was made, and the lands were set apart for the maintenance of the worship of the joint family Idols, and the Plaintiffs sought in that suit, on the ground of the first partition having been inoperative and the second operative, that as to their four-fifths in the lands so dedicated, the leases and sales effected by *Hurreenath Roy* should be set aside and possession given to the Plaintiffs.

The Defendant, *Hurreenath Dutt*, in that suit asserted that the first partition was in all respects *bonâ fide*, and was given full effect to, and that the alleged second partition was a mere fraudulent device and fabrication.

In the present case *Hurreenath Dutt* was the Plaintiff, and the Plaintiffs in the other suit Defendants. The Plaintiffs' suit was framed to get rid of various alienations by, and dealings, of the Defendants, with certain other lands situate in *East Burdwan* which were admitted, by the partition of 1229, and previous Deeds of dedication, which that



partition confirmed and gave effect to, to have been set apart for the maintenance of the joint family worship, and sought to have the Plaintiffs' share in the lands so dedicated, made over to him to maintain *pro tanto* for the purposes of the worship.

The Defendants' answer set up precisely the same case as their plaint in the other suit, viz., that the partition of 1245 *B.E.*, had altered the disposition of the family property made by the former partition and the previous endowment Deeds, and that the estate though dedicated for family worship by the first, had been desecrated by the second partition, and passed thereunder to two of the Defendants for their separate use.

The general issue was the same in both suits, namely, whether the partition took place in 1229 or 1245.

The suit out of which this appeal arose, was instituted by *Hurreenath Dutt*, about five months after the institution of the other suit, in which he was made a Defendant against the *Sokheemoney Dossee*, *Brijnath Dutt*, *Boicoont Nath Dutt*, *Bindoobasini Dossee*, *Puddabutty Dossee*, who represented four out of the five Brothers who had originally formed the joint family, and the Respondents, *Kalidoss Chunder* and *Ramruttun Mittra* alienees of lot *Pilkhundee*. The subject of the suit were, first, the lands of lot *Pilkhundee*; second, certain *Lakhiraj* lands detailed in the schedule to the plaint; third, the surplus proceeds of sale of lot *Mohunpore*, which had been sold for arrears of revenue, and which the Plaintiff alleged had been received and appropriated by the Respondent, *Sokheemoney Dossee*; and fourth, the ornaments and furniture of the Idols.

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The case for the Appellants was confined to the first and second subjects, namely, *Pilkhundee* and the *Lakhiraj* dedicated lands, it having been found by the Courts below, that evidence was insufficient to establish a charge of waste or breach of trust against the Defendants, as to the third and fourth subjects of claim.

As to *Pilkhundee* and the *Lakhiraj* lands, the Plaintiff, by his plaint, proved that as they had been by the partition of 1229 and the previous Deeds of dedication of 1220 and 1227 validly dedicated and entrusted to the management of the deceased Husband of the Defendant *Sokheemoney Dossee, Manickram Dutt*, as *Sebaet* on behalf of the joint family on whose death they had come to her as his Widow impressed with the same trusts, and as she had subsequently repudiated the trust and asserted her own separate rights as to the *Lakhiraj* lands which, on their being resumed by the Government as invalid *Lakhiraj*, had, on her application and contrary to the objection of the Plaintiff, been resettled with her as her own, and as the Defendant, *Puddabutty*, the Widow of the deceased *Gopeenath*, the youngest Brother of the four Brothers of *Manickram*, had set up certain fabricated and false conveyances of *Pilkhundee*, by the last of which it purported to have passed to the Defendant (the Respondent), *Kalidoss Chunder*, a stranger to the family, from the Defendant, *Ramruttun Mittra*, an alleged Purchaser from *Puddabutty*, who was again alleged to have purchased the lot with her *Stridhun* from her Husband, *Gopeenath* (to whom it was alleged to have passed as his separate property under the second partition), the illegal and fraudulent dealings by the Defendants, with the joint endowed property,



should be set aside and possession should be given to Plaintiff of his share, viz., one-fifth of those properties, he being "willing to conduct in person the *Shebathee* business to that extent."

The Defendants, *Sokheemoney*, *Puddabuttee*, *Brijonath* and *Boikantnath*, by their joint answer admitted the execution of the earlier Deed of partition and the Deeds of endowment, that, under those Deeds, *Pilkhundee* and the *Lakhiraj* in dispute had been dedicated, as stated by the Plaintiff, alleged that by the second Deed of the partition of 1245, the earlier disposition of those properties had been done away, and that *Pilkhundee* had fallen to the share of *Gopeenath*, who sold it to his Wife, the Respondent, *Puddabutty*, for a consideration paid out of her *Stridhun*, and that she had, on the 25th of *Falgun*, 1248 (*March*, 1842), sold the same to the Defendant, *Ramruttun Mittra*, who afterwards sold it to *Kalidoss Chunder*.

As to the *Lakhiraj* lands, the Respondent, *Sokheemoney Dossee* alleged that, though dedicated by the earlier Deeds for the worship of the family Idols, they were not so by that of 1245, and that, having been resumed and settled by Government with her in 1250 (1843), the Plaintiff's claim thereto was barred both by the ordinary Law of limitation, by twelve years' adverse possession, and also under the special Law of limitation provided by Act, No. XIII. of 1848.

The Defendant, *Kalidoss Chunder*, set up the same defence as to *Pilkhundee*, and took his stand on the second partition, having given *Pilkhundee* to *Gopeenath*.

The Defendant *Ramruttun Mittra*, disclaimed all interest in the subject of the suit, but supported the

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contention of the other Defendants as to the second partition overriding the first.

The evidence put in on either side was almost identical with that in the first suit.

The Plaintiff examined Witnesses, who proved that the Respondent, *Sokheemoney Dossee*, continued, as alleged by the Plaintiff, to maintain, as *Sebaet*, the worship after her Husband's death for several years out of the rents of the *Lakhiraj* and other endowed property, and that there was no such appropriation to her own secular purposes as was alleged by the Defendants.

The Deed of sale from *Ramruttun* to *Kalidoss Chunder*, dated the 23rd *Bhadoor*, 1261 (*September*, 1854), recited the second partition as the basis of the Vendor's title, and stated it to have been effected by the five Brothers, *Manickram*, *Sumboonath*, *Bishonath*, *Kashinath*, *Gopeenath*.

On the 30th of *March*, 1860, the Judge of East *Burdwan* (Mr. *H. M. Reid*), dismissed the Plaintiff's suit with costs. The judgment, and the findings were to this effect:—That, as to the *Lakhiraj* lands resumed and settled with the Respondent, *Sokheemoney Dossee*, the Plaintiff was barred both by the ordinary law of limitation and also by the special law of limitation under Act. No. XIII. of 1848; that as to *Pilkhundee*, he was not so barred because the Defendants had shown no adverse possession in *Ramruttun* before 1853, or in any other Defendant, and that it appeared that *Sokheemoney Dossee*, even up to the date of the suit had been asserting her possession as *Sebaet*; that on the merits, the second partition was proved against the Plaintiff by his own admissions and those of his co-sharers, *i.e.* the Defendants; that, though *Kalidoss Chunder* had failed to produce or



prove his Vendor's title Deeds, yet that the absence of all those documents was compensated by the admissions of the Defendants, that such Deeds had been executed, and accordingly the Judge held under the second issue, that *Pilkhunde* had been the private property of *Gopcenath*, and was purchased from him by his Wife, *Puddabutty* with her own funds, and was sold by her to *Ramruttun*, by whom it was again sold to *Kalidoss Chunder*.

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On the 20th of June 1860, the Plaintiff, *Hurreenath*, having died pending the suit, his Son and heir, *Mohendurnath Dutt*, and the Appellant, *Juggut Mohini Dossee*, the Widow of another Son of *Hurreenath*, and Guardian of his minor Sons, filed their memorandum of appeal in the High Court from this Decree.

The appeal was heard before the Judges of the Division Bench (Messrs. *Kemp & Campbell*), who differed in opinion, and in consequence the appeal was, according to the practice of the High Court, dismissed on the 15th of April, 1863.

Justice *Kemp* was of opinion, that the first partition of 1229, and the preceding endowments were *bonâ fide* and the endowments real; that the alleged partition of 1245 was not *bonâ fide* and its execution was not proved, and that there was no evidence of any admission of it by *Hurreenath's* Father or by *Hurreenath* himself; and that, therefore, the estate of *Pilkhundee* being endowed, the alienations of it were invalid and must be set aside. That, as to limitation affecting the claim of *Pilkhundee* there was no proof of any sale to *Puddabutty* from *Gopcenath*, or of her having *Stridhun* wherefrom to pay the purchase-money, or of any sale to or real possession by *Ramruttun*, and that the alleged purchases were invalid, *benamée* and fraudulent, and that there



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had been no *bonâ fide* adverse possession. That, as to the *Lakhiraj* lands resumed and settled with *Sokheemoney Dossee*, such settlement having been made with her, not as *Sebaet*, but in her own right, and more than three years before the institution of this suit, the Plaintiff's claim was barred under the provisions of Act, No. XIII. of 1848. That the Plaintiff was not entitled to be appointed *Sebaet*, and that the relief to which he was alone entitled was to have a declaration made that the alienation of *Pilkhundee*, which was an endowed estate, was invalid and void.

Justice *Campbell* was of opinion, that though the parties alleging the partition of 1245 had not fully proved it, and much doubt might be cast on the character of that Deed, yet the *onus* was on the Plaintiff, and he had not disproved that Deed, which had been in existence for several years, and the possession under it, and which it was "probable that at one time *Bissonath* had consented to, although *Hurreenath* never did." And he, therefore, was of opinion, that the appeal should be dismissed, consequently, the decree of the Court below was affirmed.

The appeal was from this decree.

Sir *R. Palmer*, Q.C., and Mr. *Doyne*, for the Appellants,

Insisted, that it having been decided in the former appeal, *Maharanee Shibessouree Debia v. Mothooranath Acharjo* (a), that the partition took place in 1229, and not in 1245, that question was, so far as concerned the Respondents who were before the Court in that case concluded and as regarded the Respondent, *Kalidoss Chunder*, the *bonâ fides* and effect of the former, and the fraud and want of proof of the latter,

(a) 13 Moore's Ind. App. Cases, 270.



was clear and well established. That Mr. Justice *Campbell* was in error in holding, that the *onus* of disproving the second partition was on the Plaintiff. That the partition of 1229 and the continuing endowment of *Pilkhundee* having been established, the sale of it as private property to the Respondent, *Kalidoss Chunder*, even if proved to have taken place, which they submitted had not been done, was wholly invalid, *Elberling* on Inheritance, 96, and should be set aside, as held by Mr. Justice *Kemp*. That, as regarded the resumed and resettled *Lakhiraj* lands, the judgment of both the Judges of the Division Bench were erroneous, the Plaintiff's right to relief not being at all barred under the provisions of Act, No. XIII. of 1848, as those provisions related merely to the right of possession, and not to cases of trust and title, such as the present suit. That, as regarded so much of the lands now claimed as might in the opinion of their Lordships continue to be impressed with the religious trust, the Appellants, as representing the only branch of the family who had sought to maintain the trust, were entitled, at least so far as regarded their own share, and in the like manner as was asked by the Respondents in the former appeal Case, to possession as *Sebaets*.

Mr. *Leith*, for the Respondent, *Kalidoss Chunder*, submitted,

First. That the judgment of the Lower Court was right in deciding that the Plaintiff (on whom the *onus* lay) had failed to prove his alleged title to the lands in suit, and that the judgment of Mr. Justice *Campbell*, in the High Court, rightly affirmed that decision.

Second; that the judgment of the Lower Court was also right in holding that the Respondent,

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*Kalidoss Chunder*, had sufficiently proved his title to the lands in question.

Third; that the execution and validity of the Deed of partition of 21st *Srabun*, 1245, as well as the separate and exclusive possession and enjoyment of the lands by the Respondent, and those from whom he derived title, were sufficiently proved.

Fourth; that the Plaintiff, as well as his Father, under whom he claimed title as heir, had so far acquiesced in the Deed of partition, and allowed the several members of the family, and also third parties, including the Respondent, to deal with separate portions of the property comprised therein for valuable consideration on the footing of the validity thereof, that even if such Deed had been originally not binding upon him, he could not now be allowed to impeach the possession of the Respondent, who claims thereunder, and

Fifth; that it was established by the Decrees in other suits, and the other documentary as well as the oral evidence produced in this suit, that the Respondent, and those through whom he derived title, had been in continuous beneficial possession, as owners of the lot *Pilkhundee*, under a title adverse to that set up by the Plaintiff, for a period of more than twelve years preceding the institution of this suit; and that therefore the Plaintiff's suit was barred by the Act of Limitation, No. XIII. of 1848.

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Judgment was reserved, and now delivered by

The Right Hon. Sir ROBERT PHILLIMORE.

This is an appeal from a Decree passed by Mr. Justice *Kemp* and Mr. Justice *Campbell*, forming a Division Bench of the High Court of *Calcutta*, affirm-



ing a decree of the Judge of *East Burdwan*, by which the suit of the Plaintiff, now represented by the Appellants, was dismissed.

The Judges of the High Court differed in opinion on the effect of the evidence; Mr. Justice *Kemp* expressed his opinion in favour of the Plaintiff as to part of the relief which was prayed against *Kalidoss Chunder*, the only Respondent who appears on this appeal, but as the Judges were not unanimous, the decision given in the Court of First Instance stands unreversed.

The Plaintiff's suit was for possession, but not for possession in the ordinary character of proprietor of lands; he made title to the possession of these lands, for which he sued on this special ground, that they had been dedicated to the religious service of the family Idols, by virtue of two Instruments of dedication in the Christian years 1813 and 1820, which still, at the time of the suit, impressed on the lands a trust, which by his suit he sought to have declared. This was the foundation and main character of his claim, though somewhat inconsistently with the nature of the dedication, he sued for a certain proportion only, as though the suit had been one in respect of private interest. The Court could not have so dealt with the possession, under these instruments of dedication.

He asked also to be appointed *Sebaet*, or Manager of the lands so dedicated. His plaint embraced other charges of breach of trust, relating to other properties, which are no longer insisted on. The properties which this appeal relates to are one called lot *Pilkhundee*, to which Respondent makes title as a Purchaser, *bonâ fide*, for value without

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notice, and certain other lands enumerated in a schedule to the plaint, which were once claimed to be held as *Lakhiraj*, were resumed by the Government as held under an invalid *Lakhiraj* title, and were permanently settled for with Government by *Sokheemoney Dossee*. The appeal against her was heard *ex parte*. All these properties were comprised in, and dedicated by, the two instruments of dedication before mentioned.

The first *Sebaet* was the Husband of *Sokheemoney*, and after his death she held a portion at least of the dedicated lands by the title of *Sebaet* in succession to her Husband. Notice of the trust, if it be valid, is clearly established against her.

Her claim as to the lands resumed, is advanced under her settlement with the Government, the nature and effect of which will be subsequently considered.

The title of *Kalidoss Chunder* to lot *Pilkhundee* is derived through successive alleged alienations under a Deed, which will be described as a second Deed of partition, by which, as he contends, a valid partition of the family property was first constituted.

He admits that a Deed, purporting to be one of partition between the five Brothers who constituted the joint family, had been executed some years before, and that the dedication insisted on by the Plaintiff had been in fact made under those instruments of dedication before mentioned, but he seeks to avoid the effect of all upon the same grounds which were unsuccessfully advanced on the case lately decided by their Lordships on appeal (*a*), when the earlier Deed was

(*a*) *Maharanee Shibesouree Debia v. Mothooranath Acharjo*, 13 Moore's Ind. App. Cases, 270.



established as the valid deed of partition of the family property. This decision, which is partly stated in the Appellant's case, and which was read in full on the argument, need not be further referred to, except to state, that the facts there decided cannot be considered to have been established against *Kalidoss Chunder*, who was not a party to that suit. Their Lordships, therefore, will proceed to consider the facts of the case solely upon the evidence which this case presents.

The nature of the suit must be borne in mind, in considering certain questions which arise in the cause as to the burthen of proof, the general Law of Limitation, the special Law of Limitation under Act, No. XIII. of 1848, the claim to possession, and the limitation of that claim to a portion or share of the whole property dedicated.

The suit, although it seeks to set aside the mutation of names, and to have possession decreed to the Plaintiff, seeks that relief as incident to the establishment of the trust. Although that relief cannot in the present state of litigation, as the proceedings have been instituted and conducted, be allowed, still it must be considered that the suit is brought to establish a religious trust. The trust is created by the instrument of 1813, confirmed by that of 1820. It is not constituted by the first partition Deed. If any vice existed to defeat this partition Deed, that vice would not affect the dedication of the property under the antecedent instruments to the religious trust, if they show a real and not merely a colourable dedication.

The two Deeds which create and confirm the dedication are *primâ facie* valid. Nothing is proved

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to lead to the belief that they are at variance with the usages of the Country, or family, or that regard being had to the value of the property dedicated and to the property at that time of the family, there is any excess in the appropriation to the religious services of the family, of the portion of the family property thus set apart, such as to generate distrust of its reality.

It was argued that such dedications of property without the assent of the State, should be regarded as merely revocable appropriations, which the founders might vary the use. No authority whatever was adduced in support of this position, which strikes at the root of most modern endowments of the like nature.

A family trust of this nature has never in modern times, at least, been held to require such an assent. The cases supporting such trusts are too numerous for citation. They are collected in *Norton's Leading Cases on Hindu Law of Inheritance*, part ii., p. 406.

The argument of Mr. *Leith*, founded on the non-registration of these instruments of dedication at the time or shortly after the time of their execution, and on the subsequent registration of them at the time of the registration of the first Deed of partition, viz., that they constituted in effect one instrument, and rested on the sole foundation of the first Deed of partition, was not urged in the Courts below, and appears to have no foundation of fact to support it, since the mere contemporaneous registration of the three furnishes no ground for presuming such union. There is abundant evidence that all were acted on.

The trust declared on appears then to be estab-



lished as to the lands dedicated by these two prior instruments ; and it lies on the Respondents to show some subsequent legal conversion of the lands to the ordinary uses of property.

The second Deed is said to work this conversion, and the question arises which of the two Deeds of partition is to prevail.

The first Deed of partition is an instrument, which but for the existence of the Second, would have been exposed to no suspicion.

A partition is favourably viewed by the Hindoo religion and law. It wants no extrinsic support.

The alleged presumption against the first Deed, that it may have been a mere device because one member of the family was indebted, may more reasonably be removed than maintained by due attention to that fact. Such a state of things often leads to partitions, but to fair and honest ones. It would be a prudent course in the members of a joint family to prevent, by a partition, the interference of strangers in their family arrangements, and an inquiry into the state, condition, extent, and uses of their joint property ; and no suggestion has been made that the partition under the first Deed was unequal.

The second Deed, however, does afford ground for suspicion. It makes no reference whatever to the first Deed ; it professes to be the ordinary partition of a, till then, joint family property ; it appoints as a *Sebaet* one whom no prudent person would appoint a trustee, one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindoo family having several and more competent members, from the fear of the scrutiny to which it might lead if the Creditors

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of the *Sebaet* traced the property to his possession. Again, as a dedication, in fact, was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the change which this Deed seeks to effect. All comparison, therefore, supports the Deed prior in time, which priority alone, in a balanced state, would establish the first instrument.

It was urged with great force in the argument that every Judge and Court that has hitherto dealt with this second Deed, has either actually declared it invalid, or stated it to be subject to grave suspicion. A decision against the Plaintiff generally in this suit would be, in substance, deciding against a trust, *prima facie*, well established, on evidence of a subsequent Deed of revocation not only not proved but on every judicial examination of it, discredited. Their Lordships, therefore, think that a trust was created by the deeds of dedication of the *Pilkhundee* property.

It remains to be considered, whether the Respondent can support the Decree in his favour upon the ground that he is a Purchaser for value without notice. Now, the very origin of his title, as well as the contention on the mutation of names, prove that he must have had notice of the original trust. The devolution of the title to him from *Gooroochurn* under the second Deed is, until the conveyance to himself, accompanied with very suspicious circumstances at every stage of it, such as ordinarily accompany and attempt in a Hindoo family to put property out of the reach of an apprehended claim. He is not shown to have made any inquiries as to the grounds for supposing that the trust was legally at an



end; and, therefore, he cannot exonerate the property from the trust which attached to it.

The principal claim of *Sokheemoney Dossee* to hold the resumed lands free from this trust on the ground advanced by her, is destitute entirely of legal foundation. She did not rest her title so much on the operation of the second Deed of partition as a revocation of the first, as on the effect of the resumption proceedings and the settlement for revenue with her. Such a settlement does not establish proprietary right in the land, but is made with Government as to their claim to their *Khiraj*, or revenue. The settlement and the possession under it being evidence of a right to possession, are also so far evidence of proprietary right, but do not necessarily constitute it. *A fortiori*, they could not divest and destroy trust to which the Settlor was subject. The claim supposes a mere Settlement for revenue to have the same effect in clearing away preceding titles which a sale under the Revenue Laws works; but antecedent trusts have, in certain cases, been impressed by the decisions of Courts of Justice, including this Tribunal on estates, acquired even under these revenue sales. (See the cases referred to in Mr. Justice *Macpherson's* work on Mortgages, p. 86, 5th edition.) *Sokheemoney Dossee* could not get rid of her *Sebaet* title and possession by the machinery of this settlement, though it was in terms made with her as a private person. Therefore, the claims of the Plaintiff, so far as he seeks to have the trust established as to the property, receives no answer whatever from the law as to limitation of suits, or from the terms of the settlement for revenue with her.

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It remains to consider one argument which was addressed to their Lordships on one part of the evidence, which seems not to have been formerly distinctly advanced.

It was urged, that the evidence shows that the family had, in several instances under the first Deed, dealt with other portions of the property included in the dedication instruments as though they were private property. This argument was thus met, that there was no proof that the properties so dealt with were dedicated properties, since the identity of the name was perfectly consistent with properties held separately under *Malguzary* and under *Lakhiraj* titles, might both bear the same description; that a disposition of part might not be to the prejudice of the trust necessarily; and that changes of property not designed otherwise than for the benefit of the endowment would not be questioned in a Court of Justice. The correctness of each position cannot be gainsaid, and the argument for the Respondent on this point, which is conjectural, is conjecturally answered. How the real facts may be, it is not possible for their Lordships, on the evidence, to decide; but this is to be observed, that a former abuse of trust, in another instance, cannot be pleaded against a Trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as *Sebaet*. The Court could not with any propriety say, We will decline to protect the property and leave it further



exposed to loss, and decline to make a declaration that it is trust property, merely because they would not trust the Plaintiff with its administration.

The title being one founded on trust, and the contention of the holders being that it is not now in their hands subject to the trusts, *primâ facie* at least, attaching to it, the *onus* of the proof was on them. They did not discharge themselves by proving a Deed as to which Mr. *Justice Campbell* declares that he probaly would not have made it the foundation of a decree in their favour. The learned Judge appears further to have mistaken the nature of the change of possession, which he considered to have prejudiced the Plaintiff's case. The old *Sebaet* title was recorded in the Collector's Registry. A mutation of names—in itself a change—was applied for on the part of *Kalidoss Chunder*, and resisted on the part of the Plaintiff, claiming as Trustee. The Plaintiff was, in effect, referred to a civil suit, and the very reason of such a reference viz., that the matter is not in the jurisdiction of the revenue Officer, cannot, either in reason or law, invert the ordinary course of proof and presumption in a civil suit to establish a trust. Their Lordships think the judgment of Mr. Justice *Kemp*, on the facts of the case, correct, and the Decree which, but for the supposed application of the law of Limitations, Mr. Justice *Kemp* would have given as to the resumed lands, as well as to *Pilkhundee*, is that, which their Lordships will humbly advise Her Majesty to make.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be allowed; that the Decrees of the High Court and of the Court below

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be reversed, so far only as they dismiss the claim of the Plaintiff to set aside the alienation of Lot *Pilkhundee*, and to have the truth of the dedication instruments declared, and that it be declared, that the lands specified in the schedule to the plaint, and the said Lot *Pilkhundee* were and continue dedicated under the instruments of dedication of 1813 and 1820 to the religious uses specified in those instruments of endowment; and now add a declaration, that the Decree is to be without prejudice to any further suit or proceedings for the enforcements of the religious trusts declared on the appointment of a proper *Sebaet*.

Their Lordships think that the costs in the Courts below should be allowed to the respective parties, according to the usual course of proceeding in those Courts when a Plaintiff recovers part of his demand, and that the Appellant should have the costs of this appeal.



HELEN SKINNER ... *Appellant* ;

AND

SOPHIA EVELINA ORDE, WILLIAM  
ORDE, CHARLES GRANT BARLOW, } *Respondents.\**  
AND SOPHIA SKINNER ... }

*On appeal from the High Court of Judicature,  
North-Western Provinces, Allahabad.*

IN this case special leave to appeal was allowed (a) from an Order of the Judge of *Meerut*, dated the 19th of *May*, 1870, and Orders of the High Court

11th & 12th  
Dec., 1871.

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, the Right Hon. the Lord Justice Mellish the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

A Child born in *India*, whose Father was a European British subject and a Christian, must be presumed to have the Father's religion, and his corresponding civil and social

*Assessor* :—The Right Hon. Sir Lawrence Peel.

(a) See *In re Skinner*, 13 Moore's Ind. App. Cases, 532.

*status*, and it is the duty of a Guardian to bring up his Ward in his Father's religion.

An Infant, the Child of a Christian Father and the issue of a Christian marriage, was left, by the death of her Father, of very tender age, and brought up by her Mother as a Christian during her early youth. Her Mother, after cohabiting with a man having a Wife and professing the Christian religion, became, with him, a Mahomedan, for the purpose, as it appeared, of giving legal effect to a Mahomedan marriage between them, but which alleged marriage was not proved to have been duly celebrated.

The Infant, after attaining the age of fourteen years, and being with her Mother, professed a desire to become a Mahomedan in religion, and adopted the Mahomedan mode of life. The Courts in *India* having been applied to, under the circumstances, by her relatives, to remove the Infant from the custody of her Mother, made an Order under the provisions of the Acts, Nos. XL. of 1858 and IX. of 1861, and placed the Infant under a Christian Guardian. Such Order, on appeal, confirmed by the Judicial Committee.



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of Judicature for the *North-Western* Provinces, at *Allahabad*, dated the 7th of *July* and the 16th of *July*, 1870, whereby *Victoria Skinner*, an infant of the age of fourteen years, as ordered to be removed from the custody of her Mother, the Appellant, and Guardians of her person and property were appointed.

The facts of the case, as they appeared from the petition and evidence in the cause, were as follows:—

*Victoria Skinner*, the Minor, was the Daughter of *George Skinner* deceased, and the Appellant his Wife. *George Skinner* was the illegitimate Son of a native woman by a European Father. During his lifetime, and at the time of his death, *George Skinner* professed the Christian religion, and he was married to the Appellant in a Christian Church according to the Christian rites. He was killed at *Delhi* at the outbreak of the Mutiny in the year 1857.

After her Father's death, *Victoria Skinner* remained with her Mother, until she was removed from her custody and placed under the care of the Respondent, *Sophia Skinner*, by the Order of the Judge of the Court at *Meerut*. *Victoria Skinner* was entitled to a fortune estimated at Rs. 10,000, derived from an indigo estate (known as the *Skinner* estate), in which her Father had a share at the time of his death. Her income was stated to be Rs. 400 *per mensem*.

It appeared, that in the latter part of the year 1867, the Appellant formed a connection with a person named *John Thomas John*, who had formerly professed the Christian religion, but had then recently become a Mahomedan. He had at that time a Christian Wife, living at *Agra*, to whom he had been married in the year 1859, but whom he deserted in order to live with the Appellant; and from the year



1867 the Appellant continued to live, and at the respective dates of the Orders appealed from she was living, with him as his mistress or so-called Wife, and it appeared from the evidence that in the year 1869 she had a child by him, which died. It further appeared, that the Appellant never professed any religion other than Christianity at any time before she formed the connection with *John Thomas John*. She then adopted and had since professed Mahomedanism. Mr. *John*, in his evidence, stated that he embraced the Mahomedan faith in *October*, 1867, and that he contracted a Mahomedan marriage with the Appellant on the 24th of that month, but no Witness was called to prove such marriage; and he admitted, on cross-examination, that towards the end of 1868, or the beginning of 1869, he had denied the facts of the alleged marriage and of his change of faith to the Judge in whose Court he held a situation.

In the month of *April*, 1869, the Appellant and Mr. *John* removed *Victoria Skinner*, who was then thirteen years of age, from the school at *Meerut* which she was attending, and withdrew her from all Christian associations. It appeared from the evidence, that previously to that time *Victoria Skinner* had been brought up and treated as a Christian. She wore European costume, and was not kept in seclusion, but regularly went to school, and in other respects conformed to European habits. From the time of her removal from school in *April*, 1869, her education appeared to have been totally neglected. She resided entirely with the Appellant and Mr. *John* in seclusion behind the *purdah*, and under the influence of these associations, it was alleged, she was induced to renounce Christianity and profess the

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Mahomedan religion. Under these circumstances the Respondents presented a petition in the Court of the Judge of *Meerut* on the 21st of *March*, 1870, and thereby prayed that Guardians might be appointed to the person and property of the Minor, and that an account might at once be taken of the receipts and expenditure on behalf of the Minor from the Appellant and Mr. *John*. On the 22nd of *March*, 1870, the Judge of *Meerut* made an Order, that pending a final Order the Minor should be placed under the temporary charge and custody of the Respondent, *Sophia Skinner*.

The Appellant and Mr. *John*, by their answers to the petition, submitted that the Court had no jurisdiction to entertain the Respondents' application; that the petition was presented, not for the purpose of furthering *Victoria Skinner's* interests, but from hostile feelings towards Mr. *John*; that the Appellant was not, and never had been, Mr. *John's* mistress, that a marriage, legal according to Mahomedan law, had taken place between them, and had been recognized by the Petitioners; that the Appellant and Mr. *John* were not desirous of depriving *Victoria Skinner* of education and Christian associations, and that her own wishes as to her guardianship and religion ought to be consulted. The objection to the jurisdiction of the Court was based on the ground, that the Minor was a European British subject, but that objection was overruled by the Judge of *Meerut*, Mr. *G. D. Turnbull*, who, under the Act, No. XL. of 1858, made an Order, dated the 19th of *May*, 1870, directing that the Minor should be removed from her Mother's care, that the charge of her property should be placed under the Collector of the District,



and that another Guardian should be appointed for her person, the selection of such Guardian to be made either by the Court or by consent of the parties themselves.

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The Appellant and Mr. *John* appealed against that Order to the High Court of Judicature for the *North-Western* Provinces, *Allahabad*. The reasons stated in the petition were : first, that the District Court at *Meerut* had no jurisdiction to entertain the petition presented by the Petitioners ; secondly, that the evidence established that no influence was used to induce *Victoria Skinner* to change her religion ; thirdly, that assuming that the Judges found that undue influence had been used, yet the exercise of such influence was no sufficient reason for depriving the Mother of the custody of her child ; fourthly, that it was manifest that the petition was presented not for the purpose of protecting the interest of *Victoria Skinner*, but from feelings of enmity entertained by the Petitioners against the then Appellants ; and, lastly, that *Victoria Skinner* was entitled to select what religion and what Guardianship she pleased.

The appeal was heard before Mr. *C. A. Turner*, officiating Chief Justice, and Mr. *K. Spankie*, one of the Judges of the High Court, who delivered the judgment of the Court on the 7th of *July*, 1870. By that judgment the High Court confirmed the Order of the Court below, as far as it directed the removal of the Minor from the custody of her Mother, and directed the appointment of a Guardian of her person, but they considered it desirable to cancel the Order placing the property of the Minor under the charge of the Collector, and substituted for it directions for the appointment by the Court of



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a Guardian of her property. The grounds upon which the High Court confirmed the Order for the removal of the Minor from the Appellant's custody were thus stated in their judgment;—

“Whether or not a marriage has been duly celebrated in accordance with the rites of the Mahomedan law between the Appellants, that marriage could not be regarded by a Christian as valid during the lifetime of *John Thomas John's* Christian Wife. Looking at the matter from a Christian point of view, *Helen Skinner* is living in adultery with *John Thomas John*. It is also manifest that the Appellants have worked upon the Minor, to induce her to profess herself a Mahomedan. Has, then, the Judge erred in directing that the Minor be removed from the custody of the Mother? We answer that question in the negative. The Judge, in the exercise of his jurisdiction, under Act, No. XL. of 1858, is in our opinion justified in having respect to the religion professed by the Father of Minor, and in passing such Order with regard to the custody of the person of the Minor as he may hold to be in accordance with what would have been the Father's wishes, had he been alive to express them. It cannot be supposed that the Father of the Minor would have considered a woman, who, in this view, would have been leading a life of adultery, would be a suitable Guardian for his child, nor is it to be presumed that he would have desired that she should be educated in a religion other than that which he himself professed. We do not desire to be understood as holding, that a mere change of religion would justify the Court in removing a Child from the custody of the Mother, but where, under colour of her change in religion, a



Mother forms a connection or leads a life which, by persons professing her Husband's faith, would be deemed immoral, we hold that she thereby ceases to be a proper person to be entrusted with the education of her Child."

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By a further Order of the High Court, of the 16th July, 1870, it was ordered, that Miss *Scanlan*, of *Mussoorie*, should be appointed Guardian of the person of the Minor. And it was further ordered, that Miss *Scanlan* should receive such reasonable remuneration for the charge of taking care of and providing duly for the education and maintenance of the Minor, in a manner suitable to the fortune of the Minor, and in accordance with her reasonable wishes, as should be determined by the Court on the presentation of a scheme for the management of the property by Mr. *T. Bailey*. And it was further ordered, that the relatives of the Minor, and among them, the Mother of the Minor, might have reasonable access to the Minor at such times and seasons as might be right and convenient, but the permission thereby granted was expressly declared not to extend to *John Thomas John*, alias *Fan Mahomed*, claiming to be the then Husband of the Mother of the Minor.

By another Order of the High Court, on the same day, *Thomas Bailey* was appointed Guardian of the property of the Minor, and a certificate of administration granted to him for the purpose, the remuneration to be at the rate of Rs. 5 *per cent.* on all such sums as might come into his hands on the account of the Minor, and Mr. *Bailey*, at his earliest opportunity, was to inform the Court of the amount of income accruing from the property of the Minor, and should propose a scheme showing the amount to



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be expended on the education of the Minor, and the amount (if any) which might remain available for investment, after disbursing all such necessary expenses, and also the fund, or funds, in or upon which any such balances might be invested.

The Appellant having obtained special leave (a), brought the present appeal against the Order of the Judge of *Meerut* of the 19th of *May*, 1870, and the Orders of the High Court of the 7th and 16th of *July*, 1870.

Sir *R. Palmer*, Q.C., and Mr. *Cave*, for the Appellant:—

This is a question involving the right to the guardianship of an infant Mahomedan, over whom the jurisdiction of the Courts in *India* has been exercised under Acts, No. XL. of 1858 and IX. of 1861. The Appellant, the Mother of the Infant, *Victoria Skinner*, has, by an Order of the High Court, been removed from the custody and guardianship of her Daughter, an Infant of the age of fourteen years. The second section of the Minors' Act, No. XL. of 1858, gives jurisdiction to the Civil Court over the persons and property of Minors not under the protection of the Court of Wards, and not being European British subjects; the provisions of which Act are extended by the subsequent Act, No. IX. of 1861. The legal *status* and the rights of the Minor's Father have been already decided by this Court in the case of *Barlow v. Orde* (b), where it was held,

(a) See *In re Skinner*, 13 Moore's Ind. App. Cases, 532.

(b) 13 Moore's Ind. App. Cases, 277.



that the family, in truth, followed no particular religion. The special leave to appeal was granted on statements contained in the petition of the Appellant, supported by the joint declaration of herself and her Husband, *John Thomas John*, but the Court below acted on the allegations contained in the original petition of the Respondents presented to the Court of the Judge of *Meerut*; but we insist, that the allegations contained in that petition were not proved, and that even if they had been, they were not sufficient to warrant the Orders either of the Court at *Meerut* or of the High Court. The effect of the Order of the High Court is to direct that the Minor be brought up in the Christian religion, against the manifest wish and desire of the Infant herself, and contrary, as we conceive, to the law and justice of the case. Now, the Father of the Infant having appointed no Guardian, and the Infant being at his death of the age of only one and a half years, the Mother was the natural Guardian for nurture, and was entitled to the custody of the child, subject, of course, to the right of the Court, in its discretion, to interfere and direct its education, as directed by Act, No. XL. of 1858, sect. 26. A Mother is only removable on the ground of immorality, *Rex v. Greenhill* (a); *Reg. v. Clarke* (b); *In re Moore* (c); *In re Curtis* (d). In the last case it was held, that the Court of Chancery would not interfere with the legal custody of a Child by taking it from its Father, simply with reference to what was most for the Infant's benefit. In *Erskine Perry's Oriental Cases* in the Supreme Court of *Bombay* there are two cases the converse of that decided

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(a) 4 A. & E. 624.

(b) 7 E. & B. 186.

(c) 11 Ir. C. L. Rep. (N. S.), 1.

(d) 28 L. J. (Ch.), 458.



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by the High Court, *Reg. v. Shapuri Bazonji* (a); in that case a Parsee family detained an infant Child from its Father on the ground of the Father having embraced the Christian religion. The Supreme Court at *Bombay*, on a Writ of *habeas corpus*, ordered the Child to be given up to the Father; and in the case of a Brahmin convert, *Reg. v. Niskett* (b), that Court ordered a Hindoo boy of twelve years old to be delivered up to his Father, and refused to examine the Boy as to his capacity and knowledge of the Christian religion, or as to his wishes to remain with his Christian instructor. The assumption by the High Court that the Appellant was leading an immoral life was not warranted by the facts of the case; the Appellant's marriage with *John Thomas John* was valid, and sufficiently proved. It was performed in the presence of Witnesses, which is all that is requisite by the Mahomedan law: *Hamilton's Hedaya*, Vol. I., Book II., ch. I., p. 25 [Ed. by Grady].

It is clearly not for the Infant's benefit that she should be separated from her Mother. The general rule of English Courts regarding the bringing up of the Infant in the Father's religion is not disputed: *Austin v. Austin* (c); *In re Newbery* (d); but that rule is not applicable here: there is no certainty what the Father's faith really was: *Barlow v. Orde* (e). Here the Infant is of sufficient age to select for herself what faith she prefers, and has, upon due deliberation, chosen the Mahomedan. In *In re Conner* (f)

(a) Perry's Oriental Cases, p. 91.

(b) *Ibid.* p. 103.

(c) 34 Beav. 257, 265.

(d) Law Rep. 1 Eq. 431.

(e) 13 Moore's Ind. App. Cases, 277.

(f) 16 Ir. C. L. Rep. (N.S.), 112.



the Court refused to take a Child of tender years from the custody of its Mother on the ground that the Mother's religion differed from that of the deceased Father. The rule that the Father's religion is to be enforced, is subject to the discretion of the Court whether or not it is for the welfare of the Child. In *Stourton v. Stourton* (a) it was held that, whatever the religion of the Mother is, provided she is not immoral, the Court would not, when the Infant is old enough, have his religious views interfered with. Here the Infant is of the age of fourteen years: *Witty v. Marshall* (b).

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Mr. C. E. Pollock Q. C., Mr. Horace Davey, and  
Mr. M. D. Chalmers, for the Respondents :—

The Order of the Judge at *Meerut*, as well as those of the High Court, were justified under the Acts, Nos. XL. of 1858 and IX. of 1861, which give ample jurisdiction over Minors in such cases as this. The Father was undoubtedly a Christian, he was married according to the form of the Church of *England*, and professed that religion up to the time of his death. When the Father has not left any expressed direction as to the religion in which his children are to be educated, the Court will assume that his wishes were that they were to be educated in his own religion: *In re North* (c). The rule of the English Courts, that the Child should be brought up in the Father's religion, therefore, is applicable; and it is the duty of the Guardian to bring the Minor up as a Christian, and the Court will control

(a) 8 De G. M. & G. 760.

(b) 1 Y. & C. (N. R.), 68.

(c) 11 Jur. 7.



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the Guardian, *Jones v. Powell* (a), unless there are circumstances which take the case out of the rule: *Stourton v. Stourton* (b); *Hawksworth v. Hawksworth* (c); *In re Darcys* (d); *Reg. v. Clarke* (e); *In re O'Malleys, Minors* (f). The English law must be the governing rule in this case: *Abraham v. Abraham* (g). The Acts, Nos. XL. of 1858 and IX. of 1861, have amply provided for such a case as this, and have been properly applied by the Courts below. Nothing could be more impolitic, as well as inexpedient, than that this Tribunal should interfere with the discretion exercised by the Courts in *India* in a matter affecting so materially the interests of the Infant. The Mahomedan law is wholly inapplicable, as it applies only when the whole family are Mahomedans. It does not recognize such a state of things as exists in this Country. The laws of marriage and the custody and control of Infants by their Guardians provide for the protection of a Minor so situated as the Infant here.

11th Dec.,  
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Their Lordships' judgment having been reserved, was now delivered by

The Lord Justice JAMES :—

This is an appeal from an Order of the High Court of the *North-West* Provinces, in substance, confirming an Order of the Judge of the Court of *Meerut*, removing an Infant Ward and her property

(a) 9 Beav. 345

(b) 8 De G. M. & G. 760.

(c) Law Rep. 6 Ch. Ap. 542.

(d) 11 Ir. C. L. Rep. 298.

(e) 7 E. & B. 186.

(f) 8 Ir. Ch. Rep. 291.

(g) 9 Moore's Ind. App. Cases, 237.



from the custody and guardianship of her Mother, the Appellant, and the alleged second Husband of that Mother.

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The application was made to the Judge under the provisions of the Indian Act, No. IX., 1861, which are as follows :—

“ 1. Any relative or friend of a Minor who may desire to prefer any claim in respect of the custody or guardianship of such Minor, may make an application by petition, either in person or by a duly constituted Agent, to the principal Civil Court of original jurisdiction in the District, by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the Petitioner, or his Agent, if he appear by Agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such Minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition, and the determination of the right to the custody or guardianship of such Minor.

“ 2. The Court may direct that the person having the custody or being in possession of the person of such Minor shall produce him or her in Court or on any other place appointed by the Court, on the day fixed for the hearing of, the petition, or at any other time, and may make such order for the temporary custody and protection of such Minor as may appear proper.

“ 3. On the day appointed for the hearing of the



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petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their Agents, if they appear by Agents, and such evidence as they or their Agents may adduce, and thereupon shall proceed to make such Order as it shall think fit in respect to the custody or guardianship of such Minor and the costs of the case."

The Judge accordingly, after hearing the case, presented to him, made an Order, removing the Ward from the custody of her Mother. An appeal from this Order was presented to the High Court which Court pronounced the final Order now complained of. The Act No. IX. of 1861, gives no further appeal, but on the statement made to this Tribunal that the question really involved the religious education of a Ward, special leave was given by Her Majesty, on the recommendation of this Board, to prosecute the appeal now to be disposed of.

Several English cases have been cited to their Lordships, and one is referred to and relied on in the judgment of the Judge of the Court of *Meerut*; and it is, obviously, of very great assistance to the Course in *India*, and to this Board, to see how, in the exercise of a similar jurisdiction for the same object, the Courts in this Country have thought it best to act for the protection and welfare of infant Wards. The course of decision in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court that in the matter of religious education, great, and in the absence of controlling circumstances, paramount, weight should be given to the expressed or implied wishes of the deceased Father. It was contended with some plausibility before their Lordships, that this rule had its



origin in the statutory power of English Fathers to appoint Guardians for their children.

However this may be, their Lordships do not think it necessary or desirable for the determination of this case, to refer to or rely on any such rule.

The Indian Act certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the Infant Ward, and to have given the Judge (subject, of course, to appeal) the power, and to have imposed on him the duty, of doing what, in his judgment, is best for the Infant ; and no other power or duty.

In *India*, however, all, or almost all, the great religious communities of the world exist, side by side, under the impartial rule of the British Government. While Brahmin, Buddhist, Christian, Mahomedan, Parsee, and Sikh are one nation, enjoying equal political rights and having perfect equality before the Tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of Husband and Wife, parent and child, the descent, devolution, and disposition of property are all different, depending, in each case, on the body to which the individual, is deemed to belong ; and the difference of religion pervades and governs all domestic usages and social relations.

From the very necessity of the case, a Child in *India*, under ordinary circumstances, must be presumed to have his Father's religion, and his corresponding civil and social *status* ; and it is, therefore, ordinarily and in the absence of controlling circumstances, the duty of a Guardian to train his Infant Ward in such religion.

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What are the facts of the present case? Beyond all question the Ward was the child of a Christian Father, the issue of a Christian marriage. She was left an infant of very tender years, her Father being one of the victims of the great outbreak and massacre at *Delhi* in the year 1857. She remained thenceforth under the protection of her mother, a Lady, apparently, of ancestry not Christian, and with no great knowledge of Christian tenets, or attachment to Christian habits. But she was married to a Christian in a Christian Church, and does not appear to have professed any other faith, or to have reverted in costume or customs to her ancestral faith until the autumn of 1867. The child up to that time had certainly been brought up and, so far as she was educated at all, educated as a Christian girl, eating, drinking, and associating with her Christian cousins, and going to a school.

In the autumn of 1867 this occurred. The House of the Widow became the House of one *John Thomas John*, a Clerk of inferior grade in the Judge's Court, and they lived and cohabited together as Husband and Wife, *John Thomas John* being already the Husband in Christian marriage of a living Christian Wife. It is suggested that this union was sanctified and legalized in this way—that the Widow became a Mahomedan, that *John Thomas John* became a Mahomedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahomedan form a valid Mahomedan marriage with the Widow, the Appellant.

The High Court expressed doubts of the legality of this marriage; which their Lordships think they were well warranted in entertaining.



But however this may be, their Lordships can entertain no doubt, that when the connection between *John Thomas John* and the Widow was formed, whether it was merely adulterous or under the cover of a Mahomedan marriage, the home was no longer a fit home for a Christian young girl; and if the matter had then been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home and guardianship than what had become, in fact, the home and guardianship of *John Thomas John*. The matter was not, however, brought so soon as it ought to have been to the attention of the Judge.

Some relatives interfered, in order that the child might be sent to a proper school—a proper Christian school; and *John Thomas John* and his alleged Wife, professing to yield to the suggestion, took the girl in *June*, 1869, up to *Simla*, with the avowed object of placing her in a Christian school there. They now represent that this project failed, by reason of the girl's refusal to go to school; and that she began to express a preference for the Mahomedan religion, and the Oriental mode of feminine life in seclusion behind the *purdah*; and that at some period (the time is not exactly fixed) a *Moulavie* was introduced, who confirmed her in her resolution to become a Mahomedan. The young Lady, who by this time had attained the age of fourteen years, or thereabout, made the following deposition:—

“I know Mr. *John*. I first knew him when we came to *Meerut*, and for the past two years know him well. No one has ever persuaded me to be a Mussulmani. My own feelings alone have prompted me. I wish to remain a Mussulmani. I would not be

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persuaded to become a Christian, because it is from my own conviction that I am a Mussulmani. I am in the *purdah* by my own free will. I went up to *Simla* with my Mother and Mr. *John*. They wished me to go to school, and pressed me very much to go, but I would not consent. I heard of the marriage of my Mother to Mr. *John* five or six days after it took place. I cannot say how long Mrs. *James Skinner* has known of the marriage, but she must have known of it a long time, as they have lived together for two years, and it has been matter of notoriety. I believe all Mrs. *Skinner's* family must have known of it. I wish to return to my Mother. I believe Mrs. *James Skinner* to be a Mussulmani; Mrs. *Orde* to be a Christian. To Counsel for Petitioners.—My Mother can read very little—small story Books; but she cannot read Persian, nor write at all. She can only read the *Urdu* in print, not the written character, excepting very good text-hand. I have read easy Books on religion in *Urdu*, but not studied them. I am studying the *Koran* with a Teacher. There was a picture of my Father, and there were several other pictures; but as I had heard that it was strictly forbidden to keep pictures by our religion, I, therefore, destroyed them with my own hands. The picture was on paper in a frame with glass. It was destroyed soon after we returned from the Hills. I heard that to keep pictures was prohibited after my return from the Hills, from a Preacher, a *Moulavie*, who came to the House and preached a sermon. No one advised me otherwise. I had long thought of becoming a Mussulmani, but when I was young, did not understand the different religions; when I returned from the Hills I turned my attention to it,



and had the Preacher called to preach. Almost all my family are Christians. I have had no intercourse during the last six or seven months with any others who are Christians, but their family and Mrs. *Benu*. Since I have been in their House I have not had any Letter of any kind from Mr. *John*. I had some Letters from my cousin *Sophy*, who is in *Calcutta*, and *Charlie*, which were on my Table. These I sent for. Two from *Charlie* I sent for the day before yesterday, which were old, and I tore them up; the other from *Sophy* I sent for yesterday, and showed it to Mrs. *Aldwell*. The two from *Charlie* I sent for by *Achakrai*, and the one from *Sophy* by my *Ayah*. To Counsel for Petitioners.—I know Mrs. *Benu*. I have seen her several times since I came from *Simla*. I know her to be a Christian." This evidence was, with the consent of the Council on both sides, and also of the principal parties, though the questions and answers were put and given in the vernacular of the Country, *Urdu*, recorded by the Court in English, and was read over to the Witness in *Urdu*, and by her acknowledged to be correct.

The case of the Appellant, in fact, rested on this deposition. An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young Lady's present religious convictions and natural feelings as was involved in tearing her from her Mahomedan home and Mother, and committing her to the care of a Christian strange Schoolmistress. The Judges of the High Court, however, did not think that deposition sufficient to induce them to abstain from making in *July*, 1870, the order for the appointment of the Guardian, which would have been the

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only possible Order that could have been made in 1867.

Their Lordships cannot dissent from that conclusion. It would be very easy, of course, for a Mother, under such circumstances, to procure from a young Daughter the expression of a wish to remain with her and to become a Mahomedan like her, rather than continue a Christian and go to a strange school; and it is impossible in their Lordships' judgment, to believe that in the interval which occurred between the visit to *Simla* and the application to the Court any such knowledge of the differences between the two religions had been acquired, or any such settled conscientious convictions had been formed, as to make it really likely that her moral and religious condition would be endangered by placing her where she should receive the secular and religious instruction and training which she ought to have long previously and without interruption enjoyed. Their Lordships are, therefore, of opinion, that the Order, in so far as it removed the Ward from her Mother and alleged stepfather, and placed her under a Christian Guardian, was right, and that is really the only matter that has been brought before them.

Their Lordships will humbly report to Her Majesty that, in their opinion, the Order of the High Court ought to be affirmed, and this appeal dismissed with costs.

This recommendation of their Lordships is, of course, without prejudice to any application to be made by or on behalf of the Ward concerning her future position; and considering the present age of the young Lady, their Lordships think it would be very proper for the Court to ascertain for itself what



her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her.

Affirming the principle of the Order, their Lordships feel that it would be very difficult for an appellate Tribunal in this Country to interfere without injury, as to the details of the particular guardianship and scheme, which must so essentially be a matter of *quasi* parental discretion to be exercised on the spot by those best acquainted, or best able to acquaint themselves, with all the circumstances, and their Lordships disclaim any desire so to interfere. But they suggest, for the consideration of the Court in *India* in similar cases, that while selecting a School (such, for example, as Miss *Scanlan's* in this instance) it would be desirable, where practicable, to have some independent person as Guardian, to whom the Ward could apply, in whom the Court and the Ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

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ALEXANDER JOHN FORBES ... *Appellant*;

AND

BABOO LUCHMEEPUR SINGH,  
DHUNPUT SINGH, SHEIKH  
JOWHUR ALI, and MUSSUMAT  
AMEEROONISSA BEGUM ... } *Respondents.\**

*On appeal from the High Court of Judicature at  
Fort William, in Bengal.*

24th, 25th,  
26th Nov. &  
7th & 8th  
Dec., 1871.

Exposition  
of the princi-  
ples enacted  
by the Bengal  
Regulations  
as to the  
power of a  
*Zemindar* to  
sell for arrears  
of rent the  
tenure, free

THE question in this case respected the right of the Appellant, a Mortgagee after foreclosure, against a tenant of the Mortgagor of *Talook Gohooman* held under an hereditary *Istemrary* tenure in the *Zemindary* of two of the Respondents, to the possession of such

\* Present :—Members of the *Judicial Committee*,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. Sir Montague Edward Smith.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

from previous titles and incumbrances created by a defaulting tenant.

Distinction laid down in the Regulations, between sale for arrears of revenue and for arrears of rent.

*Ben. Reg. VIII*, sect. 11, of 1819, gives express power to sell the tenure, free from all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives or assignees; but the power so given is confined to the case of tenures, where the right of selling or bringing to sale for an arrear of rent, has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure.

A Mortgagee had foreclosed under *Ben. Reg. XVII.* of 1806, and a decree was made in 1854 for possession of the mortgaged *Talook*. In 1855 a summary suit was brought by the *Zemindar* against the heirs of the *Talookdar* (the Mortgagor) for arrears of rent, to which the Mortgagee was not made a party. A decree for sale was made *ex parte*, and the *Talook* sold by auction, under Act, No VI. of 1858. The Mortgagee then brought a suit to recover possession of the *Talook*, and to set aside the sale by the *Zemindar* for arrears of rent. Held, reversing the decision of the High Court, that, as it was an *Istemrary talook*, the *Zemindar* had no power by the *Bengal Regulations*, or Act, No. X. 1859, Sect. 105, to sell the tenure, and the sale declared invalid.

The case of *Shahabooddeen v. Futteh Ali* (7 W. R., 260) approved of and followed.



sub-tenure purchased, against a Purchaser at a sale in execution of a decree for rent which had accrued before the foreclosure, and involved the question, whether by such a sale the tenure itself passed, or merely the interest of the Tenant and the Mortgagor.

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The suit was instituted by the Appellant to establish his right, as proprietor and *Istemrardar* to recover possession, with mesne profits, of the *Talook Gohooman*, &c., held under an hereditary *Istemrardar*, a fixed rent tenure, situate in *Pergunnah Havalee, Zillah Purneah*; and as ancillary to the above relief, the Appellant sought by the suit to set aside an execution sale of the *Talook*, effected under the provisions of Act, No. VI. of 1853, and Act, No. VIII. of 1835, which incorporated *Ben. Reg. VII.* of 1799, sect. 15. The sale sought to be set aside was in execution and satisfaction of a money Decree obtained, *ex parte*, by the *Zemindar, Baboo Pertab Sing* (since deceased), in a summary suit instituted by him in the Court of the Deputy Government Collector, for arrears of rent in respect of the *Talook*, against the heirs of a former *Istemrardar, Shah Ali Reza*, then deceased, in pursuance of the provisions of *Reg. VIII.* of 1831, in respect of arrears of rent, or enhancement of rent, under which *Talook* was sold under process of execution to realize the amount of the decree, as being the property of the Defendants in their representative capacity, as the heirs in succession of *Baboo Pertab Singh*.

The questions at issue in the Court below were first, whether the sale in execution of the decree passed anything more than the title and interest of the Defendants as heirs of the *Istemrardar, Shah Ali Reza*; and whether the sale was valid as against the Appellant, a Mortgagee of the *Istemrardar Talook* under a *Bye-*



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*bil-waffa* (deed of conditional sale) from *Shah Ali Reza*, who had become the absolute Owner of the tenure, and had confirmed his title by having obtained under Reg. XVII. of 1806 first a decree of foreclosure and subsequently a decree of the *Zillah* Judge, for possession made in a regular suit brought with that object against the former *Istemrardar*, and which, on appeal to the late *Sudder Dewanny Adwalut*, at *Calcutta*, was finally affirmed by an Order of Her Majesty in Council, made on the appeal of *Forbes v. Ameeroonissa Begum* (a). Secondly, as to the invalidity of the sale, in consequence of the non-observance of certain steps and conditions prescribed in respect to sales by *Ben. Reg. VIII. of 1831, Act, No. VIII. of 1835, sect. 2*, that ten days' notice shall be given of any such intended sales. Thirdly, whether the sale should be set aside, on the ground, that it had been admitted by the *Zemindar*, in a petition presented by him to the Government Collector, that the sale was not carried out *bonâ fide*, but fraudulently, although he alleged that the fraud was the act of his *Mookhtar*, who had been by him intrusted with the conduct and carrying out of the sale, and the *Mookhter* (the Respondent *Sheikh Fowhur Ali*) having, while acting in such fiduciary position, become the Purchaser in his own name of the *Talook*, at an inadequate price.

The Principal *Sudder Ameen* (*Beenee Madhul Thome*), on the 28th of *March* 1860, dismissed the Appellant's suit with costs, mainly upon the ground of his having no right of action, in consequence of a former *Sudder Ameen* decreeing that the summary suit of the *Zemindar* had been rightly brought, and

(a) See case reported, 10 Moore's Ind. App. Cases, 340.



against the proper parties, and that the sale of the *Talook* under the Decree obtained in that suit was legal and valid, and that it was not proved that there was any irregularity or fraud in the sale.

The Appellant appealed to the High Court at *Calcutta*, and a division Bench, consisting of the Justices, *H. T. Raikes* and *Shumbhoo-Nath Pundit*, on the 12th of *March*, 1863, dismissed the appeal on the single ground that the Appellant was no longer in a position to carry on his appeal, as his right of action had been lost to him by reason of the Decree of the late *Sudder Court* in 1862, having dismissed his foreclosure suit.

A petition for review of judgment was afterwards allowed, on the ground that the auction sale to the Respondent *Sheikh Fowhur Ali*, did not carry with it the transfer of the tenure, but merely the transfer of the interest of the judgment Debtor at the time of the sale.

The High Court, on the 26th of *April*, 1867, consisting of Mr. *H. V. Bayley* and *Shumbhoo-Nath Pundit*, on the review of judgment, made a Decree declaring that the Plaintiff was not entitled to a Decree for setting aside the sale; in effect, affirming the decree of the Principal *Sudder Ameen* of the 28th of *March*, 1860. In the judgment the Court held, that the Appellant, if he desired to save tenure from sale in execution of the Decree obtained by the *Zemindar*, was bound to have paid not only the rent due after the Appellant had obtained his foreclosure Decree, but also that which had accrued due from the heirs of the registered *Talookdar* previous to that Decree, and that having failed to do so, it was not rights and interests which passed, but the tenure itself under the sale in execution.

The appeal was from this Decree.

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Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant ; and

Mr. *Field*, Q.C., and Mr. *Doyne*, for the Respondent, *Sheikh Fowhur Ali*.

The points argued were :—

First, as to the effect of the auction sale under the Decree in the summary suit by the *Zemindar* against the Mortgagor's heirs for arrears of rent, whether it affected more than their interests, if any, and not the tenure, which had been foreclosed by the Appellant, the Mortgagee. *Dwarkanath Doss v. Manick Chunder Doss* (a) ; *Shahabooddeen v. Futteh Ali* (b). Act, No. X. of 1859. sect. 105.

Second, whether the Respondent, the auction Purchaser under a decree for sale for arrears of rent due to the *Zemindar* had a title equivalent to that of a Purchaser at a Government sale for arrears of revenue. On this point the following Regulations and cases were referred to :—*Ben. Regs.* VII. of 1799, sect. 15, cl. 7 ; XVII. of 1793 ; XLIV. of 1793, sect. 5 ; XXXV. of 1795 ; V. of 1812 ; VIII. of 1819, sects. 8, 11, 12, 18, cl. 4 ; I of 1820, sect. 2. *Lamb v. Bejoy Kishen Doss* (c) ; *Tirthanund Thakoor v. Paresmon Jha* (d) ; *Satkouree Mitter v. Useemuddeen Sirdar* (e).

Third, as to the validity of the sale of the *Talook* in consequence of the non-observance of the conditions prescribed with respect to such sales by *Ben. Regs.* VII. of 1799 ; VIII, of 1831 ; and Acts,

(a) 3 W. R., 197.

(b) 7 W. R., 260.

(c) 8 Moore's Ind. App. Cases, 427.

(d) 13 W. R., 449.

(e) 14 Ben. S. D. A, Rep. 629



Nos. VIII. of 1835, sec. 2, and VI. of 1853, as to the notice of the intended sale.

Their Lordships' judgment having been reserved, was now delivered by

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The Right Hon. Sir MONTAGUE SMITH:—

26th Jan.,  
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This is an appeal from a decree of the High Court of *Calcutta* on review, in effect, dismissing a suit brought in the *Zillah* Court of *Purneah* in 1856 by the Appellant, as Mortgagee after foreclosure, to recover possession of certain *Talooks* in *Pergunnah Havalee*, and to set aside a judicial sale of them made at the instance of *Baboo Pertab Singh*, the *Zemindar*, under a claim for arrears of rent.

The main question in the appeal is, whether the sale of the *Talooks* made to *Sheikh Jowhur Ali*, the Respondent who alone appeared at the hearing of this appeal, under a decree in a suit instituted by the *Zemindar* against the heirs of *Shah Ali Reza*, the Mortgagee, for arrears of rent, treating them as defaulting tenants, is a valid sale as against the Appellant, the Mortgagee, who was not a party to that suit.

*Shah Ali Reza*, a Mahomedan, held the property by an hereditary tenure created by *Sunnuds* granted prior to 1793 to the ancestors of *Shah Ali Reza*. These *Sunnuds* are not set out in the present record; but it has been certified since the argument, by the Registrar of the High Court, that they are the same as those printed in the record of the appeal in a former suit between the Appellant and the representatives of *Shah Ali Reza*. Their Lordships thought it right to ascertain with accuracy the contents of these *Sunnuds*, inasmuch as the High Court based their judgment



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in a great degree on the assumption, that the tenure was made saleable for arrears of rent by special terms contained in them.

It appears from the *Sunnuds*, thus verified, that this assumption is unfounded; and it was admitted by the learned Counsel for the Respondent that if they were the same as those set out in the former Record this was so. By the *Sunnuds* the *mouzahs* are given by way of *istemrar* to *Hossein Reza* and his descendants on a fixed and absolute *jumma* of Rs. 2,291.

On the 13th of *March*, 1850, the Appellant advanced to *Shah Ali Reza* Rs. 39,500; and to secure this advance the latter made, in ordinary form, a conditional sale of the *Talooks* to him, to be absolute if the money was not repaid on 13th of *March*, 1851.

It is necessary to advert shortly to the litigation which has been going on since 1851 in this and two contemporaneous suits.

The mortgage-debt not having been paid, the Appellant took proceedings to foreclose under Reg. XVII. of 1806; and the foreclosure was completed in due course in *August*, 1852.

Thereupon, on the 28th *January*, 1853, the Appellant commenced a suit against *Shah Ali Reza* to obtain possession, which was defended on grounds impeaching the validity of the foreclosure. This suit passed through all the Courts, and underwent a great variety of fortune. The *Zillah* Judge on the 18th of *December*, 1854 (a day material to be borne in mind), made a decree in favour of the Appellant for the possession of the *Talooks*. On appeal to the *Sudder Dewanny Adawlut*, the suit was remanded, when the then *Zillah* Judge dismissed it, and the



*Sudder* Court affirmed his decision ; but both these judgments were reversed by Her Majesty on appeal, and the Order in Council declared, that the Appellant was entitled to the possession of the mortgaged premises as absolute Owner. The case is reported in 10 Moore's Ind. App. Cases, 340.

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The Order in Council bears date on the 3rd of *February*, 1866.

Shortly after the decree of the *Zillah* Judge of the 18th of *December* 1854, in the Appellant's suit for possession, viz., on the 6th of *January*. 1855, the *Zemindar*, *Baboo Pertab Singh*, brought a summary suit in the Collector's Court against the heirs of *Shah-Ali Reza* for arrears of rent. The heirs in that suit allowed judgment to go by default, and on the 26th of *February*, 1855, an *ex parte* decree was made against them for the amount of the arrears claimed, viz., Rs. 712. On the 19th of *March*, 1855, the *Zemindar* prayed that the Decree might be put into execution and the *Talooks* sold, and they were sold accordingly on the 26th of *April*, 1855, to the Respondent, *Sheikh Fowhur Ali*, for Rs 1,000. This is the sale which it is sought to set aside in the present suit.

Advocate High Court  
Jammu & Kashmir  
Srinagar.

It is plain that, when this summary suit against the heirs of *Shah Ali Reza* was commenced, they had no title or right whatever in the *Talooks*. The Appellant had become absolute Owner, and, moreover, he had obtained the Decree of the *Zillah* Judge for possession, which was ultimately sustained on the final appeal to Her Majesty.

On the 24th *March*, 1856, the Appellant commenced the present suit to set aside the sale and for



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possession against the *Zemindar*, the Purchaser, *Sheikh Fowhur Ali*, and the heirs of *Shah Ali Reza*.

His right to recover was at first opposed in the Courts below, on the ground that by the judgments given in *India* in the first of the above-mentioned suits, his title, by foreclosure, had been invalidated; and, on this objection, decrees were made against him by the *Zillah* and High Courts. On the reversal of these decrees by Her Majesty in Council, in 1866, the Appellant, in order to obtain the fruits of the long litigation, at last decided in his favour, obtained a re-hearing of his case on review, and the High Court then pronounced the judgment against him, now under appeal.

The contention of the Appellant is, that the *Zemindar* could only sell the interest of the heirs of *Shah Ali Reza* (if any), and not the tenure and estate which had passed to him before the Decree for sale; and he also impeached the sale on the ground that it was fraudulent and collusive, and on objections founded on various alleged irregularities.

In the view taken by their Lordships, it will only be necessary to consider the first point, viz., the right of the *Zemindar* to sell, under the Decree in the summary suit against the heirs of *Shah Ali Reza*, the tenure then vested in the Appellant.

The Respondent contends that the sale was, by law, valid. He relies on the facts that some rent was in arrear, that *Shah Ali Reza's* name was on the Register, and his heirs in possession, and that the Appellant did not tender the amount of the arrears.

But, on the other hand, it appears, that if the heirs of *Shah Ali Reza* were in possession, which is somewhat uncertain on the facts, their names were not



put on the *Zemindar's* Register, and it also appears that, shortly after the commencement of the summary suit by the *Zemindar*, and before the Decree for sale, the Officers of the *Zillah* Court, in pursuance of the Decree of the 18th of *December*, 1854, gave the Appellant symbolical possession by planting Bamboos, which the *Zemindar's* Agents soon afterwards pulled up, and that the Appellant's Agent tendered the rent for *December*, 1854, at the *Cutchery* of the *Zemindar*, and that such tender was then refused, with the answer, that *Sazawals* had been appointed, and that until they were removed no rent would be received. It also appears, that the Appellant endeavoured to get his name placed on the Register of the *Zemindar*, and that before the sale he applied to the *Zillah* Judge for a *Perwannah*, directing the *Zemindar* to place his name on the Register, who refused the Order. The Appellant did not then apply to the *Zemindar*, and it may be inferred that he did not do so because the proceedings of the *Zemindar*, who had then obtained the Decree against the heirs of *Shah Ali Reza*, had shown that such an application was useless.

It is apparent from these facts, that the *Zemindar* had the fullest notice of the title of the Appellant and of his claim to possession before the Decree for sale, and that having that notice, he proceeded, without notice to him, to obtain a decree for sale, *ex parte* against the heirs of *Shah Ali Reza*. There can also be no doubt that the Purchaser, *Seikh Fowhur Ali* (who was, in fact, the *Mookhtar* of the *Zemindar*, and purchased at a grossly inadequate price), had in the same way notice of the Appellant's title, and his proceedings. It requires very plain positive law to

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support such a sale against the real Owner under a decree thus obtained.

The High Court, in the judgment under appeal, assume that the *Sunnuds*, in their terms gave the *Zemindar* power to sell the tenure itself free from incumbrances; but in the event of that construction being unfounded the learned Counsel for the Respondent contended, that the *Zemindar* had that power either as an incident to the tenure, or by virtue of the Regulations.

No authority was shown to satisfy their Lordships that, by any known law or usage, *Zemindars* had the power to sell tenures of this kind for arrears of rent, as a right inherent or incident to the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations.

A long and minute commentary was made, during the argument, upon the Regulations bearing on the subject from 1793 downwards, with the view, on the part of the Respondent, of showing that they authorized a sale of the tenure itself, free of previous titles and incumbrances, created by the defaulting tenant and his predecessors.

Their Lordships do not think it necessary to discuss in detail these Regulations, because they are disposed to agree in the main with the construction put upon them in a decision of the full High Court, which is directly opposed to this contention. The decision referred to was pronounced in an elaborate judgment of the full Bench of the High Court (the Chief Justice, Sir *Barnes Peacock*, presiding), in which the Regulations are fully collated and examined, *Shahabooddeen v. Futteh Ali and another* (7 Weekly Reporter, 260). This, which may be



regarded as the leading decision in *India*, has been followed by the Courts there, *Tirthanund Thakoor v. Paresmon Jha* (13 Weekly Reporter, 449); *Mohesh Chunder Banerjee v. Chunder Monee Debee* (15 Weekly Reporter, 237). It is true that the Courts in these decisions had to construe Act, No. X. of 1859, and not Regulation VII. of 1799, which had then been repealed; but powers of sale analogous to those found in the Regulation of 1799, are provided in section 105, of Act, No. X. of 1859, with this difference—that the language of the latter Act is more favourable to the contention of the Respondent than that of Regulation VII. of 1799. The Chief Justice, in commenting on the Regulation of 1799, considered it to be clear, that the power to sell the tenure itself free from incumbrances, was not given by that Regulation.

The Regulations principally relied on by the Respondent are, VII. of 1799, sect. 15, cl. 7, and VIII. of 1819. The seventh clause of the Regulation of 1799 relied on, declares that “if the defaulter be a dependent *Talookdar*, or the holder of any other tenure which, by the title deeds or established usage of the Country is transferable by sale or otherwise, it may be brought to sale by application to the *Dewanny Adawlut*, in satisfaction of the arrear of rent.”

The language is not well adapted to meet the case of incumbered tenures, but the words, if the defaulter be the holder of any tenure, it may be sold, may fairly mean that the tenure the defaulter holds, or has, such as it is in his hands, may be sold, and it does not seem to be a forced construction, that the decisions above referred to have put on the Act, in holding that if the tenure has passed to another, and is no longer in him, the alleged manner enabling it to

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be sold for his debt, and that if he has an incumbered tenure, then only the interest which he has in it is subject to the power of sale.

The older Regulations of 1793, 1795, and 1799 were referred to for the purpose of showing the general object to have been to give the *Zemindar* the same powers to recover rents from their dependent *Talookdars* as the Government had to recover the fixed revenue from them; but these provisions relate principally to powers of distress. The recital relied on in the preamble of Regulation XXXV., 1795 (which relates to distress), viz., that justice required that Proprietors should have the means of levying their rents and revenues with equal punctuality as the Government, is not found in Regulation VII. of 1799; and would not justify a construction of that Regulation which would give, by an inference, a power of sale of so stringent a kind as that contended for.

Regulation VIII., 1819, section 11, cl. 1, no doubt gives an express power to sell the tenure free of all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives, or Assignees; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent, has been specially reserved by stipulation, in the engagements interchanged in the creation of the tenure.

The preamble of the Act, No. X. of 1859, shows the existence of such tenures and the Regulation treats them as a distinct class.

It has been already pointed out that the *Sunnuds* in this case do not contain this special power, and that the High Court was in error in so assuming.



The present case is stronger in favour of the Appellant than that cited from 7 Weekly Reporter. In this case, before the *Zemindar* took proceedings against the heirs of *Shah Ali Reza*, the title of the Appellant had passed beyond the stage of being an incumbrance only on the tenure. He had become the absolute Owner of the tenure itself, and the heirs of *Shah Ali Reza*, against whom the summary suit was brought, had no title or interest whatever left in it. They were not the "holders of any tenure," to use the words of Regulation VII. of 1799, and were certainly not "Proprietors" in the words of the Regulation VIII. of 1819.

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The judgment below was also grounded on the fact, that the heirs were in actual possession, and that the name of *Shah Ali Reza*, their ancestor, was on the Register. This was so, but they were holding possession wrongfully. Not only was their title gone, but a Decree for possession had been obtained against them, and executed so far as it was possible to do so. Their possession, therefore, was in no sense lawful, and their mere *de facto* possession was known by the *Zemindar* to be wrongful. With this knowledge the *Zemindar* could not properly treat the heirs as holders of tenure, so as to affect the rights of the Appellant, of whose title and efforts to obtain possession he had notice.

It is true the Appellant did not tender the rent which was the subject of the suit against the heirs, but on the other hand, when he tendered the rent due from the date of his Decree, at the *Cutchery* the prior rent was not demanded of him, and, on the contrary, he was told that the *Zemindar's Sazawals* were in possession, and that no rent would be received.



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These facts, coupled with the other proceedings of the *Zemindar's* Agents, show that a further tender was useless, and, therefore, unnecessary, even assuming that such a tender ought to have been made to stop the proceedings in the summary suit against the heirs to which he was no party, which their Lordships are by no means prepared to affirm.

In recommending the reversal of the judgment under appeal, their Lordships, in effect, affirm the authority of the decision of the Full Bench in the case of *Shahabooddeen v. Futteh Ali*, referred to from the 7th Weekly Reporter, 260. It may be inferred from their judgment that the High Court in this case would have followed that authority, if the terms of the *Sunnuds* had been correctly brought before them.

Their Lordships do not desire by this judgment to weaken any powers that *Zemindars* may, by law, possess to enforce payment of their rents. What other powers and remedies the *Zemindar, Baboo Pertab Sing*, had, and might have exercised, it is not necessary, nor is it now of any general importance to determine, for the remedies for arrears of rent are at present mainly provided by Act, No. X. of 1859, and subsequent Acts. The only question their Lordships are called upon to decide is, as to the validity of this sale, and they have come to the conclusion that, under the Regulations in force at the time, and under the circumstances of this case, this sale, for the reasons already given, was invalid.

Their Lordships think that the Appellant is entitled to the mesne profits from the time of the sale to *Sheikh Fowhur Ali*, as against him; and that in taking the account of such profits, all rent and arrears of rent due and payable to *Baboo Pertab Singh* and his heirs



should be deducted and allowed. The Appellant also claims to be entitled to a Decree for mesne profits against the heirs of *Baboo Pertab Singh*, on the grounds (1) that the *Zemindar* was acting in collusion with *Sheikh Fowhur Ali*; and (2) that he persisted in the sale of the *Talooks*, when he knew that the heirs of *Shah Ali Reza*, who alone were Defendants in this suit, had no interest at all in them. Their Lordships do not think it necessary to express any opinion on the charge of collusion; but considering that the *Zemindar* proceeded to obtain a sale of the tenure, notwithstanding he had notice of the Appellant's title, and of the Order made by the *Zillah* Court for giving him possession, and that such sale has been the means of keeping the Appellant out of possession, and the cause of this suit, and that he has persistently disputed the title of the Appellant, they are of opinion, that the Decree for mesne profits should be against the heirs of *Baboo Pertab Singh* as well as against *Seikh Fowhur Ali*, but that execution should not be had against such heirs in respect of them until after failure to obtain satisfaction from *Sheikh Fowhur Ali*.

Their Lordships will, therefore, humbly recommend to Her Majesty that the Decree appealed from be reversed, and that it be declared that the sale to *Sheikh Fowhur Ali* was invalid, and should be set aside, that the Appellant is entitled to possession, and to be registered as the holder of the *Talooks*, and that he has been so entitled since the Decree of the *Zillah* Court of *Purneah* of the 18th of *December*, 1854; and that it should also be declared, that the Appellant is entitled to mesne profits from the time and in manner above mentioned; and, further, that the Respondents should pay the costs of the litigation in

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*India*, and if any costs have been paid in *India* they should be refunded, and their Lordships will direct that the Appellant should have the costs of this appeal.

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RAMAMANI AMMAL (as Mother and  
 Guardian of MUTTU DURAISAWMI  
 TAVAR) ... .. } *Appellant* ;

AND

KULANTHAI NATCHEAR, and others *Respondents*.\*

*On appeal from the High Court at Madras.*

19th, 20th, &  
 22nd July,  
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A marriage  
 between a  
*Zemindar* of  
 the *Malavar*  
 class, a sub-  
 division of  
 the *Soodra*  
 caste, with a

THE facts of the case are so fully stated, and the evidence examined in detail in their Lordships' judg-

\* Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

woman of the *Vellala* class of *Soodras*. Held (1) as to the *factum*, that a marriage had taken place, and (2) that such a marriage was valid by Hindoo law.

In questions of disputed facts, the rule of the Judicial Committee is, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to the Courts below may commonly be; that due weight must be given to the evidence; and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed, without some grave grounds to support the imputation, as such a rejection would virtually submit the decision of the rights of others to the suspicion, and not to the deliberate judgment, of the Judge. The entire history of a family must, therefore, not be thrown aside because the evidence of some of the Witnesses is incredible or untrustworthy.



ment as to require no further statement that the nature of the question raised by the suit.

The suit was instituted in the Civil Court of *Madura*, by the Appellant (as Mother and Guardian of *Muttu Duraisawmi Taver*), in which the first Respondent was the principal Defendant, to obtain possession of the real and personal estate of *Sivasawmi Taver*, deceased, formerly of *Ramnad*, a sub-division *Zemindar*. The Respondent was admittedly the Widow of *Sivasawmi Taver*, but the Appellant alleged, and the Respondent denied, that she was legally married to *Sivasawmi Taver*, or that her Son, *Muttu Duraisawmi Taver*, was the Son and Heir of *Sivasawmi Taver*. Upon the suit coming on for hearing, the Acting Civil Judge, Mr. *N. C. Pochin*, decided in favour of the Plaintiff, holding the marriage valid in fact and law; but this decree was, upon appeal, reversed by the High Court at *Madras*, consisting of the Justices *Holloway* and *Innes*, who dismissed the suit with costs. Hence the present appeal, which was argued by

Mr. *Leith*, and Mr. *Benjamin*, for the Appellant;

Sir *R. Palmer*, Q.C., and Mr. *F. C. J. Millar*, for the first and principal Respondent.

The consideration of their Lordships' judgment having been reserved, judgment was now delivered by

The Right Hon. The Lord Justice JAMES :—

This is an appeal from a decision of the High Court at *Madras*, which reversed a Decree of the

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Civil Judge of the *Zillah* of *Madura* in favour of the Appellant.

The suit was brought by the Appellant, as Mother and Guardian of her infant Son, to establish his right as the legitimate and sole Son and Heir of *Sivasawmi Taver* of *Ramnad*, to inherit the property, movable and immovable, of the Father, valued in the plaint at Rs. 94,795. The Plaintiff claimed in the plaint stating herself to have been the second Wife of the deceased, and made title to the sub-division *zemin-dary* of *Ramnad* on behalf of her Son. The first Defendant was the childless Widow of the late *Zemindar*, according to the Appellant's representation, the senior, and to her own, his sole Widow. The other Defendant, who was joined as a Defendant on a ground not established, viz., his having possessed himself of part of the estate of the deceased after his death, was a first cousin of the late *Zemindar*. Both Defendants disputed the marriage of the Plaintiff and the legitimacy of her Son.

The statement of both Defendants was that the Plaintiff was a Dancing-girl, and treating that *status*, or caste, as continuing, they both insisted that she could not be the Wife of her alleged Husband that her Son could not, since she was a prostitute, be the Son of the late *Zemindar*, and could not have any title to inherit, even had a marriage between the *Zemindar* and the child's Mother been celebrated in fact. They denied that any marriage had taken place. It is unnecessary to repeat the very language of these statements, which, as translated, is coarse and unbecoming. It is plain, that the case insisted on was that the Plaintiff herself was a Dancing-girl, not merely the child of one, at the same time when her



connection with the *Zemindar* commenced, which the Defendants represented as a connection with a Dancing-girl, a prostitute by profession, attached to the Temple service.

Their statement contains no intimation of her having abandoned that calling prior to the birth of these children, or at all. The language used, plainly imports a continuing *status*; that the Judge so understood the statements appears from the issues which he framed.

The term "Dancing-girl" was not sued in the answers. A fouler name was there used, and it seems to their Lordships to have been designedly employed to mark a distinction between an intercourse with a concubine and one with a common prostitute, which might influence the decision of a question of filiation and legitimacy.

The issues were, first, whether the Plaintiff was a *Vellala* woman, or a Dancing-girl.

Secondly, whether the Plaintiff was legally married to the *Zemindar*.

The third issue was one of law as to the validity of the marriage, should it be proved.

The fourth issue was one of fact as to the second Defendant's possession of the property which he was alleged to have appropriated. This issue was found for the Defendants. The finding is not appealed against; and this part of the case, except as the charge effects the honesty of the Plaintiff's claim, need not be considered.

The Plaintiff claimed to be by birth a legitimate child of one *Shunmuga Pillai*, a *Soodra* man, of the *Vellala*, one of the sub-divisions of the *Soodra*, caste. As such she would be a *Vellala* woman. The

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Defendants insisted that she was a mere Dancing-girl connected with the service of the Hindoo Idol, at a *Pagoda* situate at *Tiruchuly*, the place of her birth and of her Father's residence, who was the headsman of the village. The Judge uses, in the issue which he framed, the term "Dancing-girl," as distinct from the *Vellala* class, to denote a particular class of women, described in treatises on Hindoo Law as incapable of contracting marriage.

The parties went to trial on the issues before stated. The proofs and conduct of the case of the Defendants were applied to and influenced by them.

That her alleged Son really was the *Zemindar's* Son was made by such unquestionable evidence that it was strongly pressed on their Lordships, that the Defendants had in fact never intended to represent her as not having the *status* of a concubine, or the children as not having the *status* of illegitimate children; but had only denied that she was the Wife, and that the children were legitimate. Their Lordships are unable so to read the case made by the pleadings with the light thrown upon it by the evidence of her exposing herself openly on the balcony with all the outward marks and costume of a professional Dancing-girl, and such evidence as the following: "As *Tanga Nathear* is the Daughter of a Dancing-girl, I did not hear who her Father was. As she is a Dancing-girl's Daughter, who can be called her Father? I know *Muttu Duraisawmi*, the second Plaintiff, his Mother is *Ramamani Ammal*. I have not heard who his Father is." The case originally made and attempted to be established was, that of professional prostitution and of promiscuous intercourse, so that in Hindoo law and opinion, as well as



in English, it would be impossible to predicate any paternity of the offspring.

The statement that she was a Dancing-girl was designed to affect her case in two ways, first as to the *factum*, and then as to the legality of the alleged marriage.

The evidence that she was not a Dancing-girl was adduced by the Plaintiff, in support of her case by anticipation to rebut that of the Defendants, which their Counsel stated to have been principally directed to prove this her original condition of life. If a marriage *de facto* were proved by the Plaintiff's Witnesses, it lay on the Defendants to show conclusively that such *de facto* marriage could not legitimate the children of it, and thus, in that event, the failure to substantiate this issue would be fatal to the defence, on the question of legitimacy.

The Plaintiff called many Witnesses, twenty four in number, thirteen of whom deposed to the marriage; amongst these, not fewer than five Witnesses of the *Zemindar's* family, nearly allied to him, *primâ facie* at least, unimpeached and credible Witnesses, such as a Court would ordinarily desire to hear on a question of this kind in issue before it, and would be most disposed to trust, proved their actual presence at the marriage. Her father, her whole Brother, and her half-Brother proved the Plaintiff to be of the *Vellala* caste, and a member of their common family.

The Civil Court of *Madura*, of which Mr. *Pochin* was then the Judge, believing these Witnesses, necessarily decided that the marriage was proved, and also that the Plaintiff never was a Dancing-girl. On appeal to the High Court, that decision wa4

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reversed upon the first point. On the second point, the High Court did not come to a positive conclusion that the Plaintiff had been a Dancing-girl, but stated that they inclined to that opinion, an expression indicating distrust of the Defendant's Witnesses to the fact that several of them had actually seen her officiating in that character.

The *Zemindar* was not of the *Vellala* caste. His caste, also an inferior *Soodra* caste, was that of the *Malavars*. The union in marriage of persons of these two sub-grades of *Soodras* seems to have been uncommon, and the legality of such marriage was doubted at the time when the *Zemindar* is said to have married the Appellant. The marriage between such a man and a mere Dancing-girl has been described as "impossible." The Judges of the High Court express much doubt, whether a marriage between the *Zemindar* and a *Vellala* woman would be legal, but they do not directly affirm its illegality. On the argument of this appeal this objection was not insisted on; it was conceded on both sides that recent decisions had declared the legality of a marriage between persons of those two sub-classes of the *Soodra* caste. This uncertainty, which undoubtedly prevailed at one time as to the legal rights flowing from such matrimonial connections, has an important bearing on the proof of a part of this case, and will subsequently be considered.

The case before their Lordships is one of conflicting evidence and of conflicting decisions. The opinion of Mr. *Pochin*, the Judge who tried the case, is opposed to that of two Judges of the High Court. They differ as to the habits of natives in their domestic relations, as to the credibility of



Witnesses, the weight of evidence, and the proper inferences to be drawn from conduct. The decision of the case by their Lordships must necessarily involve a somewhat close examination of part of the evidence and of the grounds of the opinions of the Judges of the respective Courts.

It was urged on behalf of the Appellant that Mr. *Pochin*, who saw and heard the Witnesses, could better judge of their respective claims to belief than the appellate Tribunal. On the other hand, it is stated, that as he was an European, his advantage in that respect over the appellate Court was less than that of an intelligent native Judge.

It is due to Mr. *Pochin* to observe, that he appears to have been extremely diligent and laborious in the conduct of his investigation. In a case of great uncertainty and difficulty, where no evidence is exempt from suspicion, if in all parts of the case his conclusions have not the concurrence of their Lordships' opinion, such difference of opinion should not weaken his just claims to respect. The decisions of both Courts will receive the most anxious and respectful attention.

The first in order and weightiest of the objections made to Mr. *Pochin's* conclusions by the Judges of the High Court, as well as by the Counsel for the Respondent in their very able arguments before their Lordships is that he had failed to observe the total improbability of the story told by *Shummunga Pillay*, the Father of the Appellant, as to her introduction into the family by the deceased *Zemindar*, and to draw the inferences which should rationally and justly have been drawn from that strange story. Their Lordships, on this part of the case, agree with the

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judgment of the High Court which pronounces the story of the treaty for marriage and introduction of the Bride incredible as it is told. They think that the story as told does not give a true history of the circumstances under which this Lady first came to enter and reside in the *Zemindar's* house; and they also think that the statement of the Father of the Appellant as to the origin of his connection with her Mother, warrants an inference not much at variance with the observations of the High Court upon it. There may have been family matters which a Husband and Father would be studious to conceal. The existence of such matters would afford an explanation of the conduct of the parties in the celebration of the alleged marriage more satisfactory than that suggested by Mr. *Pochin*, viz., that the inferiority of the fortune and social position of the Father of the Appellant to that of the *Zemindar* might account for an introduction and reception of a Bride not usual in native families, an explanation which certainly is not satisfactory to their Lordships.

The story of the marriage must be viewed as full of suspicion in its very outset, and, therefore, requiring a more than ordinary degree of jealous scrutiny, a jealousy which must extend itself to the testimony of the Witnesses of the marriage.

Their Lordships are led by the judgment under review, and by some portion of the argument that has been addressed to them, to state, as has often been stated before by this Committee, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be; that is, due weight



must be given to evidence there as elsewhere, and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others to the suspicions and not to the deliberate judgment of their appointed Judges. Nor must an entire history be thrown aside because the evidence, or some of the evidence, of some of the Witnesses is increditable or untrustworthy.

On the subject of the marriage, in fact, of the *Zemindar* to this Lady, the Plaintiff, their Lordships think that the judgment of Mr. *Pochin* is fully supported by the evidence; and that so very strong a *primâ facie* case is made in favour of the marriage as to require the most conclusive evidence for its overthrow. It must be borne in mind that, whilst the evidence of the marriage given by many apparently credible Witnesses having presumably no motive to misrepresent the fact or to deceive the Court, and incapable of being themselves deceived about it, is direct and positive, that by which it is met is, for the greater part, indirect and inferential, turning on the improbability and inefficacy of the marriage of a Dancing-girl. The evidence in support of the marriage is that of numerous Witnesses of respectable position and character, members of the family, the very Witnesses whose evidence in like cases is looked for by a Court, and the absence of which weakens every case where such absence is found; confirmed, moreover, by the treatment by the *Zemindar* of his children as legitimate, which,

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in the opinion of their Lordships, the marriage of his Daughter, *Thanga Natchear*, sufficiently proves. This treatment alone, unless answered, would, after the death of the parents, suffice to establish a claim to a direct lineal succession against a reversioner, and must receive its due weight here.

Upon the question of recognition of his children as legitimate, their Lordships are compelled to express their dissent from the conclusions of the High Court. The marriage of the Daughter of the *Rajah*, as legitimate, is a fact sufficiently proved. The Husband and his Father have both been examined. The evidence of the Husband leads directly to the conclusion that he married his wife as legitimate, concluding her to be so. He says that he would not have married her had she been the Daughter of a Dancing-girl. This statement is such as might be expected from him. The Father confirms him, and presumption from experience confirms both. The Witness himself is unimpeached; on what ground, then, should his statement be set aside? The Judges of the High Court say, in effect, that as he was marrying the Daughter of a powerful man his scruples might, therefore, give way; but what is this but opposing a conjecture of the Court itself to positive testimony against its truth; the conjecture itself seems to derive no support from the wealth or power of the *Zemindar*, for relatively to the Husband and his family, the *Zemindar* was not a man high above them in fortune or rank, nor does the alliance seem to have been above the degree or the reasonable expectations of one of the Husband's family. Again, the High Court observes that the marriage was not like that of a legitimate Daughter, as it was



not celebrated with the ceremony of the *Homan*; which, however, the Husband says did accompany it. He is contradicted, indeed, on this point; but though this conflict of testimony might induce doubt in the minds of the Judges, still they were not justified, in this balanced state of the evidence, in reasoning concerning the *status* of the Bride, her Mother, and Brother, on the basis of the absence of this ceremony. Other circumstances, which ordinarily attend the marriage of a legitimate Daughter, as the existence of an alliance equal and honourable, the presence of near relatives and friends on both sides were proved, and nothing, even had the ceremony of the *Homan* been omitted, would have indicated a marriage between unequals in degree. The other circumstances which have been argued on the side of the Appellants as proofs of recognition, by the Father of his children as legitimate, viz., the *Benamee* transaction, afford no certain indication of the sense in which the terms Son and Daughter were used by the Father. Their Lordships cannot, however, agree with the Judges of the High Court in thinking that these documents support an inference of illegitimacy. They are obviously *Benamee* transactions, so common as to require no explanation why, in a particular instance, they were adopted. In an acknowledged case of legitimate birth they would have excited no attention. They afford no sort of evidence that the *Zemindar* designed them at all to be a provision for children. As these children, even if illegitimate and incapable of inheriting, would have been entitled to maintenance and provision in his lifetime, gifts not exceeding such an allowance of maintenance as would have been fair and usual, would have been no material

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advancement of their interests. It is unnecessary to enter upon any examination in detail of the family co-membership, position, and respectability of those Witnesses, members of the family, who depose to their presence at the marriage. The judgment of the High Court gives them due weight, abstractedly of the particular ground on which it justifies the rejection of their evidence. The propriety of this rejection of a whole body of evidence otherwise unimpeached, must now be considered.

The Advocate-General, who was Counsel for the plaintiff, had admitted that the Agent of the superior *Rajah* of *Ramnad* supplied the necessary funds for carrying on her suit. It was obviously an admission made in a spirit of rectitude, involving, as made, no acknowledgment or sense of any violation of any law or duty whatever. Such an act may be viewed in very different lights; it might bear the character of a generous support, on the part of a powerful head of a House compassionating the helpless state of a child contending for a just inheritance, and acknowledged by its Father in his lifetime as a legitimate Son.

It might, on the other hand, be capable of being viewed as a spiteful and vindictive act, an unprincipled maintenance of a wrongful suit. What presumption was there in this case to lead the mind to entertain either view? The Manager of the *Rajah* is not a party to the suit. His conduct was in no other respect before the Court. No ground existed for supposing him capable of what would have been every criminal conspiracy, liable to severe punishment. His name was inserted in a list of the Defendant's Witnesses, which fact seems to conflict



with the statement of the pleadings, that his enmity produced the claim.

The Witnesses themselves, whom the hypothesis supposes to be all perjured, the Court below had believed, seeing them, and observing no signs of falsehood in them. The hypothesis of the High Court is, that the *Rajah's* Agents had got up the case from enmity. One Witness for the Defendants, it seems, had opposed the *Rajah's* adoption. This was held evidence enough; and it is assumed that this Agent had influence enough to make all these *primâ facie* respectable men come forward to support in Court a notoriously false case by deliberate perjury, for their guilt admitted of no concealment on the hypothesis of mere well-known concubinage and illegitimacy. Let it be conceded that the Father of the present Plaintiff had wilfully given an untrue account of the first introduction of his Daughter into the *Zemindar's* family, yet other grounds might be supposed, if mere supposition could in any case be made, for concealment and untruth on the subject of his family connections, which would not be inconsistent with the marriage of his Daughter to the *Zemindar*.

But it may be said a marriage with a Dancing-girl was incredible. The High Court has not found the fact that she was a Dancing-girl, and this foundation is wanting to their rejection of this evidence: they should first have been convinced of that. A marriage *de facto* then being established and supported by recognition by the deceased *Zemindar* of these children as legitimate, the very strongest evidence would be required to show that the law denied to these children their presumable legal *status*,

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on the ground of their Mother's incapacity to contract a marriage. The first point taken in this part of the case was that the incapacity to inherit had been virtually admitted by the acknowledgment of the first Defendant's title as heiress.

This point was relied on by the Judges of the High Court, and was strongly urged on the argument of this appeal. The certificate of heirship granted to the elder Widow under the circumstances and unopposed, was declared to be a tacit admission of absence of title in the Claimant in this suit. Considerable weight is due, *primâ facie*, to such a submission to an adverse title as the objection supposes, but the weight depends on the just belief that the parties whose interests are affected by acquiescence possess knowledge of their right, means to enforce it, and counsels how to set about resisting, a step injurious to it, which are ordinarily in the possession or reach of either of two rival Claimants. One of the Plaintiffs in this case is an infant; the other is a Hindoo female. Against neither is it the practice of the Courts in *India* to press a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title, and especially not of such a title as this certificate evidences. The contrary doctrine has been constantly affirmed and acted on, both in Indian Courts and before this Tribunal. In addition to this it must be observed that, if a supposed acquiescence in one place be contemporaneous nearly with a claim not abandoned, it amounts to little or nothing.

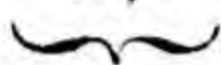
This case affords ground for the conclusion that the germ of this litigation existed in the Palace at the time of the *Zemindar's* death, and was never



afterwards abandoned. The hypothesis that the claim sprung up, first, from the spite of the *Rajah's* Agent, is inconsistent with the occurrence in the family at the time of the *Rajah's* death. The Brother of the first Plaintiff was before and at the time of the death in the Palace. He sent for his Father, who came, and was present at the funeral ceremony. This summons and presence leads to the conclusion that in some mode the Lady's own family were acting on a supposed right to be included amongst the family connections. It is most improbable that the Daughter's Husband would admit her illegitimacy, and his assertion of his Wife's legitimacy would be virtually that of her infant Brother, whose maternal Grandfather and Uncle were present. The performance of the obsequies, by delegation, by the Son-in-law of the deceased *Zemindar*, whilst the second Defendant was at hand, who was the elder Widow's Nephew, and her Manager subsequently, leads to the same inference of a then existing claim by the child's friends. And if this claim were then being urged, though not acquiesced in, the hypothesis of its after origin is inadmissible. There is no evidence that it was ever intentionally abandoned; for temporary helplessness and want of funds may very easily be supposed to have been the causes of inaction and delay for a time. The excuses made for the choice of the Son-in-law are feeble and unconvincing. One relative might be as alleged, unpunctual, but why should all be behind their time?

Can, then, this marriage *de facto* be supposed an idle, and in a Hindoo point of view, profane ceremony? Such, it is conceded on all sides, it would have been

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if the marriage was with the Dancing-girl, in the sense of the statements and issue.

Their Lordships entirely concur with the opinion of the Judge who tried the cause that the evidence on the part of the Defendants to prove the Plaintiff a Dancing-girl at any time of her life fails. He has given his reasons for thinking her not a Dancing-girl, which it is unnecessary to repeat; they are corroborated by others of considerable weight, which at least balance the inference drawn from her name, age, and puberty. The whole Brother was a Witness. His caste is that of his Father. It is not to be presumed that his Father, the head of his village, would violate the ordinary feelings of people of his caste, and make a distinction between children of the same womb, leaving the Daughter to lead a licentious life, from which, according to the hypothesis, he had withdrawn her Mother. The children of this man's acknowledged and admitted marriage prove that the children of both connections were brought up together as one family. This theory, therefore, of her original *status* as a Dancing-girl of the Temple has formidable presumption opposed to it at its outset. The Judge has remarked on the conflicting character of the evidence given in support of it; on the non-production of the alleged Mother of the Plaintiff. Mr. *Benjamin* strengthened very materially the inference which the Judge drew therefrom, by referring to the abstract of the Defendants' evidence, and the unexplained omissions to produce evidence from the Temple. Their Lordships feel strongly that if a few years only before the suit, she had been an avowed public Dancing-girl attached to the



Temple, clear and abundant evidence of that fact might have been given. Considerable reliance was placed in the argument before their Lordships on the evidence of *Abdool Khadur*, which will, therefore, be considered more particularly than that of the other Witnesses, who depose to the Plaintiff having been a Dancing-girl. This Witness was represented correctly as a Government Official, as one who *prima facie* was entitled to credit as an independent and respectable person. He deposed to the Plaintiff having actually appeared and danced before him at *Tiruchuly* in the years 1847, 1848, and 1849. His story when subjected to a careful examination appears to their Lordships to bear a strong resemblance to those admissions which the wants of a case often produce. Being an Official his only connection with *Tiruchuly* was that he went on circuit there with his master. Nothing is shown to induce the belief that the Dancing-girls would more engage his attention or thoughts, than would be the case with ordinary Official persons, before whom such appearances took place to do them honour. It is not represented by the Witness that any special cause for distinguishing this particular Dancing-girl from the rest existed, that she was eminent above the others in beauty or grace, or that her after fortune fixed in his memory, what otherwise might have been a fleeting impression. Yet after the long interval of eighteen or nineteen years he is deposing to the name, parentage, and appearance of one individual Dancing-girl. This is unexplained. It may be that, if his evidence had been obtained in the careful manner in which evidence is ordinarily brought out in an English Court of Justice, these improbabilities might disappear, and

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his evidence prove to be supportable for the reasons urged to support it before their Lordships; but their Lordships have no assurance that the evidence is capable of being supported by these considerations, that her after fortune led to the remembrance of her, or that she otherwise possessed any superiority over her associates. The Witness proceeds to give another account of the matter, for he represents that he heard from *Shunmuga Pillai* that she was his Daughter. "He said he kept her Mother, and also gave me his Daughter's name." No explanation has been given, and none suggests itself to their Lordships' minds to account for a communication so utterly improbable. It is shown that *Shunmuga Pillai* had, from his first intercourse with her, withdrawn the Mother from her former life, whatever it was, and had placed her in his House. Such a communication by a Hindoo headman to a stranger and a *Mussulman* is opposed to all experience of native habits: when and how did it occur, what produced it? The Witness does not state, that *Shunmuga Pillai* was present and pointed her out; or otherwise account for that supposed fulness of description which would identify the particular Dancing-girl. He deposes further to another conversation equally improbable and at variance with native usage; and lastly, represents himself as casually producing this most important evidence, which, if true, would fix on the Plaintiff the *status* of a common Dancing-girl, in an interview with the *Vakeel* which had reference to another cause, one of his own, with nothing whatever to lead to a discovery of evidence so important to the *Vakeel*, and so little likely to have been then casually disclosed. Such testimony is very common, it is possible in a given



case that it may be true, but it is of so dangerous a nature, and presents so few claims to be believed, that evidence of the kind is little regarded even though the Witness deposing to it be in no other way discredited than as one deposing to evidence on which a Court cannot rely.

The presumption against her imputed *status*, which the marriage of the Daughter affords, and the whole evidence leads their Lordships to affirm on this point, the conclusion of the Judge below, that the Plaintiff herself was not a Dancing-girl, and was not one incapacitated to contract marriage.

The observations of Mr. *Pochin* concerning the habits of native families from which the Judges of the High Court dissent, seem not to have been applied by him to the case of a Concubine treated with respect and attention little inferior to that of a Wife. He was dealing with a case presented to him of a Dancing-girl, and was applying his mind to the statements, issue, and evidence before him. Both Tribunals may be correct enough with respect to that which each was considering. The High Court, however, is inconsistent with it itself in some respects, for whilst it entertained the gravest doubts, whether a marriage, if celebrated, would have had any validity, it regards the acts of the Plaintiff and her advisers as unaffected by the like uncertainty. The judges suppose the Plaintiff must have known that if a marriage had taken place, her Son would be legitimate, a matter which certainly, was involved in considerable uncertainty, which their judgment shows them to have shared.

The legal presumption in favour of a child born in his Father's House of a Mother lodged, and apparently

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treated as a Wife, treated as a legitimate child by his Father, and whose legitimacy is disputed after the Father's death, is one safe and proper to be made; and the opposing case should be put to strict proof. The legal presumption as to the *status* of Mother and Son accords with the actual finding of the Court below, which had before it very strong proof indeed of recognition and actual marriage. This decision was reversed on grounds which impute to many Witnesses *primâ facie*, not likely to have committed it, a very serious criminal conspiracy, subjecting all the parties to it to severe punishment. This imputation was one unwarranted by any proofs in the cause, and militated against the ordinary rule that crime is not to be presumed.

Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed, and that in lieu thereof, an order be made dismissing the appeal to that Court from the Decree of the *Zillah* Judge with costs, and that the Appellant have the costs of this appeal.

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✓ JOGENDRO DEB ROY KUT ... *Appellant,*

AND

FUNINDRO DEB ROY KUT ... *Respondent.\**

*On appeal from the High Court at Fort William,  
Bengal.*

THE suit out of which this appeal arose was instituted by the Respondent for a declaration of his right to certain real and personal estates, and to obtain possession, with mesne profits. The question in the appeal was confined to the point, whether a judgment of the late *Sudder Dewanny Adawlut*, dated the 8th of *February*, 1853, was a bar to the suit.

The facts were these:—

° Present:—Members of the *Judicial committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*Assessor*:—The Right Hon. Sir Lawrence Peel.

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A *Rajah* of an impartible *Raj* died, leaving children by various Wives and Concubines. A suit for possession of the *Raj* was brought by one of the Widows, on behalf of an infant, to set aside a summary Award, under Act, No. XIX. of 1841,

giving possession, and for possession of the *Raj*. This suit involved issues of legitimacy, and the validity of a particular form of marriage of one of the members of the family. The *Sudder Dewanny Adawlut* decreed in favour of the Plaintiff. Another suit was afterwards brought by a member of the family, who was not a party to the former suit, against the party in possession, which raised substantially the same issue of legitimacy, and a further question of priority to succeed by reason of the superior nature of the marriage of which the Plaintiff was the issue. The Defendant pleaded the decree of the *Sudder Court* as a bar to the suit. Held that the suit raised a different issue, and, acting upon *Kanhya Lall v. Radha Churn* (7 W. R., 338), that the decree in a former suit was not a judgment *in rem*, but a judgment *inter partes*.



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*Surbo Deb Roy Kut*, Rajah of *Fulpilgoorce*, was the former proprietor of the estate. He died in the month of *January*, 1848. He left numerous Wives, Concubines, and several Sons, among whom were *Mukurund Deb*, whose Mother's name was *Jamoonce*, and who was Father of the Appellant, and *Rajendro Deb*, a Minor, whose Mother's name was *Bissessuree*. The Respondent, *Funindro Deb Roy*, was born after the death of *Surbo Deb Roy Kut*, his Mother's name being *Dhoolpee* or *Rutnessurry*.

On the death of *Surbo Deb Roy Kut*, disputes as to the succession arose, and the name of the Minor, *Rajendro Deb*, was recorded in the Collectorate as the proprietor of the estate, under protest from the *Mukurund Deb*, who, on the 15th of *April*, 1848, made an application to the *Judge of the Civil Court* of the District, under Act, No. XIX. of 1841, claiming his right to succeed, and alleging that possession had been usurped by *Bissessuree*, as Guardian of the Minor, and that the Minor had no lawful title to the *Raj*. On this application possession of the *Raj* was awarded to *Mukurund Deb*. Thereupon *Bissessuree*, on behalf of her Son, *Rajendro Deb*, and in conjunction with one *Hurdeb Kooer*, his Uncle, instituted a suit against *Mukurund Deb*, in the Court of the Principal *Sudder Ameen*, praying for possession of the movable and immovable properties, left by *Surbo Deb Roy Kut*, on the ground that *Rajendro Deb* was the legitimate heir of his deceased Father, while *Mukurund Deb* was the Son of a slave-girl. By the decision of the Principal *Sudder Ameen* (*Ahnud Buxsh*) (dated the 8th of *September*, 1851,) the suit was decreed, and an Order granted under the Act, No. XIX.



of 1841, in favour of *Mukurund Deb* was reversed, on the ground, that the legitimacy of the Plaintiff was established, and that *Mukurund Deb* was the Son of a slave-girl.

Against this decision *Mukurund Deb* appealed to the *Sudder Dewanny Adawlut*, and by a majority of the Court (Messrs. *Dunbar*, *Mytton*, and *Mills*, dissenting), judgment was given in his favour, under which he retained possession of the estate until his death.

*Chundershekur Deb Roy Kut*, the eldest Son of *Mukurund Deb*, succeeded his Father to the *Raj* and the possession, and dying without a Son, was succeeded in the year 1865 by his next Brother, the Appellant.

The present suit was commenced on the 25th of June 1866, by *Hurro Mohun Dass*, on behalf of the Respondent, who was then a Minor, against the Appellant, *Jogendro Deb Roy Kut*, in the Court of the Principal *Sudder Ameen* of *Zillah Rungpore*. In the plaint the same allegation was made that had been negatived in the former suit, that *Mukurund Deb* was born of a slave-girl, and the succession was claimed for the Respondent, on the ground that he was born of a married Wife of the first-class, and by the usage of the family had the heritable right. It was further alleged, that the decree of the 8th of February, 1853, was passed during the infancy of the Minor, and in his absence, and obtained by the concealment of material facts, and that the Plaintiff was not bound by that decree.

The Appellant, by his statement in answer, pleaded the decree of the *Sudder Court* as conclusive of his right to succeed, and denied the Plaintiff's allegation

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as to his Mother being of a class of Wives superior to that of the Defendant's Mother.

Issues were framed by the Judge; the material one, the third, in bar of the suit, was as follows:—Whether the decision of the late *Sudder* Court, dated the 8th of *February*, 1853, in any way operated as a bar to the Plaintiff's claim, or finally disposed of any question in reference to the birth of the Defendant's Father, *Mukurund Deb*, and others, and had been decided in that suit, whether his (*Mukurund Deb's*) Mother was married according to the *Brahmo*, or whether she was out of the *Dhasia* class, and whether the decree was obtained by collusion.

Although the material allegation on which the Plaintiff relied, viz.: that he was the Son of a Wife of superior class, while *Mukurund Deb* was the Son of a slave-girl, had been distinctly traversed, and an issue raised thereon, the Plaintiff offered no evidence, either as to the *status* of his Mother, or on any other issue.

On the 12th of *March*, 1867, the Judge of *Rungpore*, Mr. *J. C. Fowle*, by his judgment on the third issue, stated that the real question was, whether or not the judgment of the *Sudder* Court was a judgment *in rem*. That in the case of *Rajendro v. Mukurund Deb*, the latter pleaded that he was the Son of his Mother married according to *Brahmo* form, and that he had been declared by his Father to be his heir. That the *Sudder* Court found from the evidence of the Witnesses who gave evidence in his favour, and from the documents filed, that *Mukurund Deb* was legitimate, and the declared heir of his Father; and that the Court did not find *Mukurund Deb* legitimate in accordance with the *Gundhurbo* form, and only found him legiti-



mate upon the evidence adduced by him, and which deposed to his mother, *Jamoonie*, having been married according to the ceremonies held at the marriage of women accorded to the first class. That it was quite evident that the judgment in that case did not merely decree to *Mukurund Deb* a title superior to the younger Brother, *Rajendro Deb*, but decreed him to be legitimate, and the rightful heir and that it was a judgment which must hold good against the world; and after dealing with the allegation that the decree was obtained by fraud and collusion, which the Judge held was not proved, he declared that there was no necessity to consider the other issues, and dismissed the suit with costs.

An appeal, in *formâ pauperis*, to the High Court was admitted.

By the judgment of a Division Bench of the High Court, consisting of Messrs. *Kemp* and *Jackson*, on the appeal, on the 24th of *July*, 1868, it was held, that the decision of the *Sudder Court* of the 8th *February*, 1853, in the circumstances, was not binding on the Plaintiff, and reversed the decision of the Judge of *Rungpore*, and demanded the case to him in order that he might try the remaining issues.

The appeal was from this decree, and, in consequence of the Respondent not appearing, was heard *ex parte*.

Mr. *Doyne*, and Mr. *A. Mortimer*, for the Appellant:—

The judgment of the *Sudder Dewanny Adawlut*, of the 8th of *February*, 1853, a competent Court having jurisdiction, was a judgment *in rem*, and operated as *res Judicata*, and, therefore, as in the

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case of an estoppel was a bar to the suit. *Kanhya Loll v. Radha Churn* (a). *Meer Bahadoor Ali v. Mussumat Suneechuroo* (b). Upon the application of the doctrine of the Civil Law in proceedings *in rem*, and the effect of a judgment operating as an estoppel, they referred to *Gail. Obs.*, p. 112; *Oughton's Ordo Judiciorum*, Vol. I., *Tit. ccv.*; *Browne's Civil Law*, Vol. II., pp. 363, 396 (2nd Ed.); and by the English law, to *Taylor on Evidence*, Vol. II. § 1487 (3rd Ed.); *Starkie on Evidence*, Vol. I. pp. 215, 225 (2nd Ed.); *The Duchess of Kingston's Case* (c); *Meddowcroft v. Hugunin* (d).

The Right Hon. Sir JAMES COLVILE;—

This appeal is brought by *Jogendur Deb Roy Kut*, the Defendant in the suit out of which the appeal arises, against a decree of the High Court, which overruled a decree of the *Zillah* Court, whereby a judgment in a former suit which had been pleaded was declared to be a bar to the further prosecution of this suit, and directed that the suit should be remanded to the *Zillah* Court for trial upon the other issues raised therein. This was the only point before the High Court, and the only question which is now legitimately before their Lordships. Mr. *Doyne* indeed suggested, that their Lordships might give certain directions concerning the further trial of the suit if it went back to be tried in the *Zillah* Court, but that course would be entirely contrary to the practice of this Tribunal. The ground of appeal to

(a) 7 W. R., 338.

(b) 6 W. R., 157.

(c) 20 State Trials 355, and see note to Smith's *Leading Cases*, Vol. II., p. 424 [2nd Ed].

(d) 3 Curt. Ecc. Rep., 403. S. C., on appeal, 4 Moore's P. C. Cases, 386.



the High Court was that the learned Judge was wrong in holding that the decision of the late *Sudder* Court, dated the 8th of *February*, 1853, was a judgment *in rem*, and that as such a bar to the present suit. The High Court's judgment is to this effect :—"The Judge holds that that judgment of the *Sudder* Court was a judgment *in rem*, declaring the title of the Defendant, *Mukurund Deb*, to the disputed *Raj*, and consequently that that judgment was a binding judgment not only against the party in that case, but against all the world ; and it follows, according to the opinion of the Judge, that that judgment was decisive against the present Plaintiff, and that the present Plaintiff cannot consequently succeed." The High Court then refer to the judgment of the full bench in *Kanhya Loll v. Radha Churn* (7th Weekly Reporter, 338), in which the law was laid down that judgments of this description were not judgments *in rem*, but judgment *inter partes*. They also say : "It is evident that the issues which were raised in the former suit are by no means identical with the issues which arise in this case. The Plaintiff or his representative was in no way a party to the former judgment and was not represented in that suit, and the decree then passed can in no way be binding upon him. The decision of the Judge must be reversed and the case remanded to him, in order that he may try the remaining issues which arise in it." Therefore, it is perfectly clear, that the question before stated, is the only question which now presents itself for their Lordships' decision.

Their Lordships do not think it necessary to embarrass themselves with much discussion with respect to the nature of a judgment *in rem*, technically so called

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It appears to them to be extremely doubtful, whether there exists in *India* (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of Probate and the like, and which in the case of War might be exercised in matters of prize) any ordinary Court capable of giving, what can be called technically a judgment *in rem*, but they will look to the substance of the thing, and consider whether there is any reasonable ground for the contention that the effect of a judgment *in rem* ought to be given to such a judgment as that which was pleaded in this case.

Now, the circumstances of the former suit were these. *Surbo Deb Roy Kut*, the Father of the Respondent and Grandfather of the Appellant, died in 1850, and there arose a contest among the members of his family, children by various Wives or Concubines, as to who should succeed to the *Raj*, and, with the *Raj*, to the possession of the property. It is admitted that the succession is impartible, and on the death of a *Rajah* passes to the eldest of the Sons of equal rank; and it is further alleged, though not perhaps admitted, that according to the custom of the family the issue of one kind of marriage is to be preferred to the issue of another kind of marriage. On *Surbo Deb Roy Kut's* death, *Mukurund Deb* (the Father of the Appellant), the eldest of his Sons was put into possession by a summary Award of a competent Court, under the Act, No. XIX. of 1841. Upon that, *Bis-sessuree*, one of the three surviving Wives of the late *Rajah*, in conjunction with another person, brought a suit on behalf of her infant Son, *Rujendro Deb*, in order to have that Order of the Court set aside and to recover from *Mukurund Deb* the possession of the



*Raj* and the possession of the property that went with the *Raj*. The suit necessarily involved two issues; one of them was the legitimacy of the Plaintiff, who insisted that his Mother had been married to the deceased *Rajah* under the *Gundhurbo* form of marriage. If he succeeded in proving that, he had to go a step further, and to prove that *Mukurund Deb*, his elder Brother, was, as he alleged, illegitimate; that he was the Son of a woman who had not been married to the *Rajah* at all, but the Son of a slave-girl.

The Court of First Instance found in favour of the Plaintiff in the suit. It went by appeal to the *Sudder* Court. The Judges of that Court were divided, but the majority found that the Plaintiff in that suit had made out his title to be legitimate by the *Gundhurbo* marriage; and as regards *Mukurund Deb* they found that he also was legitimate, though they do not appear to have found in terms that he was the issue of a marriage in the *Brahmo* form, which was what he had pleaded. They seem to have thought that by reason of the declarations and acknowledgement of his Father he must be taken to be legitimate; and that, being at least in equal rank with the Plaintiff in that suit, and being the elder, he was as between those two parties entitled to succeed to the *Raj*.

In the present case, the Plaintiff comes forward and raises, no doubt, the same question that was raised in the former suit, as to the illegitimacy of *Mukurund Deb*, but he also raises the question of a priority of right by reason of the superior nature of the marriage between the *Sarbo Deb Roy Kut* and his Mother. The issues in the two suits, therefore, are

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not precisely the same. But if they had been precisely the same their Lordships would still have been of opinion, that the decree in the former suit is not a bar to the further prosecution of this suit. They think that this case cannot in any decree be likened to those which sometimes occur in *India*, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. It is clear that in this case all the members of the family had conflicting interests. If such a suit, as the first suit, was brought here and tried according to the law of this Country there could not be a pretence for saying, that the judgment in it was anything like a judgment *in rem*, or that it could bind any but the parties to the suit. It would have been a mere suit for possession by a party claiming to have a preferable right to the party in possession, and having failed to establish that case by proving the illegitimacy of the other party.

It, therefore, seems to their Lordships unnecessary to consider, whether an ordinary *Zillah* Court in *India* could in any case pass a decision which would have the effect contended for at the bar in this case, viz., that of determining the legitimacy of a party against all the world. It is sufficient for their Lordships to say, that the judgment pleaded in this case in bar cannot be treated as one of that nature upon any principles, whether derived from the English law or from the law and practice of *India*, which can be



applied to it, and that they must humbly advise Her Majesty to dismiss this appeal. It is an *ex parte* appeal, and it is, therefore, unnecessary to say anything about costs.

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AND

SHEIKH HAMID HOSSEIN and }  
MUSSUMAT DURJAHUN ... } *Respondents.*

AND

MUSSUMAT BEBEE BACHUN, MUSSU- }  
MAT BEBEE SOGRA and MOULVIE } *Appellants,*  
ABDOOL AZEEZ ... }

AND

SHEIKH HAMID HOSSEIN and }  
MUSSUMAT DURJAHUN ... } *Respondents.\**

*On appeal from the High Court of Judicature  
at Fort William, Bengal.*

THESE consolidated appeals were brought from a decree of the High Court at *Calcutta*, dated the 24th

12th & 13th  
Dec., 1871.

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

A Mahomedan Widow whose Husband died without issue, having been put in possession of her

Husband's estate by the Collectorate Courts as a co-heir and for her deferred dower, has a lien, as a Creditor, on the estate, and is entitled to retain possession until her dower is satisfied.

Rs. 40,000, held, in the circumstances of the *status* and means of the deceased Husband, and the custom of *Sheikh* families in *Behar*, not an excessive amount for deferred dower.



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of *December*, 1863, made in two appeals, from a decree of the Principal *Sudder Ameen* of *Zillah Behar*, dated the 31st of *December*, 1862, in two suits, distinguished respectively as Nos. 30 and 105 of 1862.

The first suit, No. 30, was in the nature of an action of ejectment, and was instituted by the Respondents as Plaintiffs against the Appellants and others as Defendants, seeking as co-heirs with the Appellant, *Mussumat Bebee Bachun*, the Widow of *Sheikh Wilayat Ally*, a Mahomedan, who died in the year 1851, to establish their right to three shares, with mesne profits, in his estate and to obtain possession, which estate the Appellant had taken possession of on her Husband's decease.

The second suit, No. 105, was in the nature of a cross suit, and was instituted by the Appellant, *Mussumat Bebee Bachun*, against the Respondents, the Plaintiffs in the former suit, to establish her right to dower, viz., the sum of Rs. 40,000, and one gold mohur, alleged to have been settled on her at the time of marriage according to the custom of *Sheikh* families in *Behar*, and also to establish her right to hold the estate to secure the payment of her deferred dower, the estate having been then insufficient to pay the debts, including her dower, which had on the decease of her Husband become due and payable.

The principal points in dispute between the parties in the first suit in the Courts below and on appeal, so far as it is necessary to state them, were, first, whether the *Mouzahs* and other property the subject of that suit (excepting two *Mouzahs* named *Poondarukh* and *Kurrarea*, and certain sums of money which the Court below refused to decree to the Plaintiffs) belonged to the Appellant, *Mussumat Bebee Bachun*, she, as



alleged, having inherited a portion thereof from her Mother, and purchased the other portion with her own private moneys, partly during the lifetime of her late Husband, and partly after his death ; or whether, as contended by the Plaintiffs ( the Respondents ) the *Mouzahs* and other property were the ancestral or purchased property of the decease. Secondly, whether ( in the event of the above point being found in favour of the Plaintiffs, the Respondents ) the Appellant, *Mussumat Bebee Bachun*, was entitled to the continued possession and enjoyment of the estate, in lieu of and until payment of her dower, to the exclusion of the other heirs of the deceased ; also, whether a decree could be made in favour of the Plaintiffs, the Respondents, as such alleged heirs, except as to their proportionate share of and in the residue of the estate, after payment thereof of the debts of *Sheikh Willayut Ally*, including the debts due by him to the Appellant, *Mussumat Bebee Bachun*, as his Widow, on account of her dower.

The questions between the parties in the second suit for dower were whether the sum fixed upon the marriage of the Appellant, *Mussumat Bebee Bachun*, as her dower, and exigible on the dissolution of the same by divorce or death of her Husband, was Rs. 40,000 and one gold mohur, or what other sum of money she was entitled to in respect of her dower.

By the decree of the *Zillah* judge (*Tarrakant Bid-dasagur* ), it was decided with reference to the first suit, that the Plaintiffs, the Respondents, were entitled to three shares ( the whole into four shares being nominally divided ) in the estate left by *Sheikh Willayut Ally* ; that such estate consisted of the *Mouzahs*, &c., claimed by them in their plaint ; that the two *Mou-*

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*za hs* above named were the property of the Appellant ; and that it was not proved that the sums of money claimed by them as part of such estate had ever been received by her. The decree also declared, with reference to the cross suit, that the Appellant, had not proved that the dower fixed on her marriage amounted to the sum claimed by her, and accordingly dismissed the suit with costs.

On appeal to the High Court from that part of the decree of the *Zillah* Judge which had reference to the first suit instituted by the Appellants in the second appeal, and on objections to such appeal made by the Respondents under sect. 348 of Act, No. VIII. of 1859, the High Court, consisting of the Justices *Steer* and *Louis Stuart Jackson*, dismissed the appeal and the objections, and affirmed that part of the decree of the *Zillah* Judge.

The decree of the High Court, on appeal from that part of the decree of the *Zillah* Judge, which had reference to the cross suit, affirmed that part of the decree, with a modification to the extent of ordering and directing that the Respondents should not recover the mesne profits of the estate, except such as had accrued since the institution of the suit.

Separate appeals were brought but were ordered to be consolidated. The joint appeals were argued by

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellants, and

Mr. *Cave*, for the Respondents.

For the Appellant, *Mussumat Bebee Bachun*, it was contended first, that she was lawfully put in possession of her deceased Husband's estate by the Collectorate



Court in 1851, and had by the Mahomedan law a lien for her deferred dower—*Ahmud Hossein v. Mussumat Khodeja* (a); *Ameer-oon Nissa v. Moored-oon Nissa* (b); *Wujah-oon Nissa Khanum v. Miza Husun Ali* (c); *Uzeezoo Nisa v. Cubut Ali Khan* (d); *Mussumat Wuzeerun v. Mohammed Hossein Khan* (e); *Macnaghten's Mah. Law*, pp. 288-9;—and, secondly, that having regard to the *status* and means of her Husband, and the custom of the *Sheikh* families in *Behar*, the amount claimed, viz., Rs. 40,000, was not an excessive amount for deferred dower.

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On the part of the Respondents it was argued, first, that the Appellant had no right to dower, or if she had any right to dower her claim was excessive; and secondly, that she had no right to possession of the real estate, *Mussumat Wuzeerun v. Mahomed Hossian Khan*, and had no lien on the estate, her claim for dower having been more than satisfied by the perception of the mesne profits of her deceased Husband's estate of which she was in possession.

Judgment was reserved and now delivered by

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The Right Hon. Sir MONTAGUE SMITH :—

The principal questions in these appeals arise from a claim made by the Appellant, as the Widow of *Seikh Willayut Ally*, a Mahomedan, to a dower of Rs. 40,000 and one gold mohur, and a further claim on her part to retain possession of lands belonging to her late Husband until her dower is satisfied.

Other claims have been made by the parties in these suits, some of which have been included in

(a) 10 W. R., Civ. Rul., 369. (b) 6 Moore's Ind App., Cases, 211.  
 (c) 1 Ben. S. D. A. Rep., 266. (d) 3 Ben. S. D. A. Rep., 321.  
 (e) 7 Ben. S. D. A. Rep., 34.



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the present appeals, and to which it will be necessary hereafter to advert.

The Appellant, and *Sheikh Willayut Ally*, who both appear to have belonged to wealthy Mahomedan families in *Behar*, were married in 1820.

The Husband died in *March*, 1851, without issues, leaving the Appellant his only Widow.

It is not now disputed that, on his death without issue, the Appellant became entitled as co-sharer to one-fourth share of her Husband's estate, and that the other three-fourths descended upon *Mussumat Raheebun*, a Sister of *Sheikh Willayut Ally*, who died shortly after her Brother, leaving the present Respondents her heirs.

In *April*, 1851, proceedings were instituted by the Appellant in the Collectorate Courts to obtain the entry of her name in the Register in place of her Husband's. She alleged in her petition that she was in possession by right of inheritance, and also on account of her dower. Objection was made on the part of the Respondents, but it did not prevail; and the lands were registered by the Collector in the name of the Appellant "without specification of share."

An appeal was made on behalf of the Respondents to the Commissioner, who affirmed the decision of the Collectors, declaring in his Order that, if the Objector, (the Respondents) had any claim, they were at liberty to find their remedy by suing in the Civil Court.

The Order of the Commissioner bears date on the 11th of *March*, 1852.

These proceedings relating to the possession of the lands are material, not only to show that the Appellant obtained the insertion of her name and possession



soon after her Husband's death, but principally because it is clear from them that she claimed to hold not merely her one-fourth share to which she was entitled as co-sharer with the heirs, but the entire estate "on account of her dower."

The Respondents, who were parties (Objectors) in these proceedings, notwithstanding that they had the fullest notice of the Appellant's pretension to hold the estate for her dower, took no step to dispute her claim, or to disturb her possession of the entire estate, from the date of the above proceedings until the commencement of the present suits, a period of nearly ten years.

On the 31st of *December*, 1862, both the suits which are by the subject of these appeals were commenced, one by the Respondents as the heirs of *Mussumat Raheebun* (deceased), Sister and heiress of *Seikh Willayut Ally*, against the Appellant (the Widow) to recover three shares of the estate, admitting her right as Widow to one-fourth share. The other was a suit by the Appellant against the Respondents to establish her claim to dower, on the alleged ground that her claim to dower might otherwise be barred by the law of limitation.

The Appellant in both suits asserted that the dower agreed to be given on her marriage was the sum of Rs. 40,000 and one gold mohur, and she claimed to hold the estate until this dower was paid; whilst the Respondents alleged that, in the family of *Sheikh Willayut Ally*, the dower was always fixed at 500 *dirrums*, and that this was the agreed amount of dower on this marriage.

The claim of *Mussumat Bebee Bachun* to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower,

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—for such a right does not arise by the Mahomedan law as a consequence of the gift of dower, nor was there any agreement on the part of the Husband to pledge his estate for the dower. But the Appellant, having obtained actual and lawful possession of the estates under a claim to hold them as heir for her dower, their Lordships are of opinion, that she is entitled to retain that possession until her dower is satisfied, and the Respondents cannot recover the possession of their shares unless that satisfaction has taken place.

It is not necessary to say, whether this right of the Widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein v. Mussumat Khodeja* (10 Weekly Reporter, Civil Rulings, 369). Whatever the right may be called, it appears to be founded on the power of the Widow, as a Creditor for her dower, to hold the property of her Husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received. This seems to have been the ground on which the claim of the Widow to retain the possession was put in *Ameer-oon Nissa v. Moorad-oon Nissa*. (6 Moore's Ind. App. Cases, 211). Whether the dower in this case has been discharged out of the proceeds of the estate, must, of course, depend on the determination of the principal question in the cause—What is the amount of the dower?

The question raised in the second issue in the dower suit was, whether the dower was fixed at Rs. 40,000 and one gold mohur, as alleged by the



Widow, or at 500 *dirrums*, under the Mahomedan law, as contended for by the Respondents.

In the possession suit, the issue (4th) was, whether *Sheikh Willayut Ally* owed *Mussumat Bebee Bachun* Rs. 40,000 and one gold mohur for dower or not.

After a great deal of evidence had been given in the suits, the Principal *Sudder Ameen* held that the Appellant had not made out that the dower was fixed at Rs. 40,000; and he also held, that the statement of the Respondents that the dower was fixed at 500 *dirrums*, "was conjectural."

On the appeal, the Judges of the High Court were of opinion, that they could not declare that the Appellant was entitled to demand "the immense sum of dowry which she claims;" but they say: "In a Mahomedan marriage between contracting parties of rank and influence, there must be of course some dowry, and it was probably a handsome one." They also say: "The omission of the Defendants to sue for their share of the inheritance indicates a consciousness on their part that *Mussumat Bebee Bachun* had a claim of dower to be satisfied from the estate, and as the amount of dower was doubtless considerable, though we cannot declare what the exact amount was, we think that, under the circumstances of the case, it will be just and equitable to order that the Defendants receive no mesne profits, except what has accrued since the institution of their suit. With this modification we confirm the judgment of the Lower Court in this case, with costs against *Mussumat Bebee Bachun*."

Their Lordships are unable to consider this judgment of the High Court as a final or satisfactory determination of the main question in the suit. The learned Judges, whilst holding that the evidence did

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not satisfy them that the dower was fixed at Rs. 40,000, declare that it "was probably a handsome one," and that the conduct of the Respondents indicates that it was "doubtless considerable." It appears to their Lordships that the Widow, on the view taken by the High Court, was, at all events, entitled to a proper dower, to be ascertained according to Mahomedan law. But no attempt was made to arrive at what would be the proper dower, nor was any account taken of the proceeds of the estate. It is obvious, therefore, that the Court has set off one unascertained sum against another unascertained sum. It seems to their Lordships that this mode of settlement, if suggested to the parties as a compromise, might perhaps have been, with their assent, a fit end of the litigation; but they think it cannot properly be made the basis of a decree between hostile litigants, and, therefore, that the decree so founded ought not to stand in its present shape.

Their Lordships, in this state of things, have thought it right to look carefully at the evidence, to see, whether they can safely arrive at a conclusion which would prevent the necessity of renewed litigation; and whilst fully alive to the importance and propriety of their ordinary rule not to interfere, unless upon very clear grounds, with the findings upon questions of fact, where the Courts of First Instance and of appeal have been in accord, they think this case comes before them under exceptional circumstances, there being in truth no explicit finding upon the question of the amount of dower.

The Appellant called nine Witnesses who were present at the marriage ceremony in 1820, and these persons say that the dower agreed to be given, was a



deferred dower of Rs. 40,000. About an equal number of Witnesses called by the Respondents, some of whom also say they were present at the marriage, state that the dower was fixed at 500 *dirrums*. It is clear from the evidence that *Sheikh Willayut* and *Mussumat Bebee Bachun* were both "in opulence from the time of their Fathers," and it is consequently more probable that a high sum was fixed than such a low sum as 500 *dirrums*, indeed the learned Judges of the High Court came to this opinion. Their Lordships would have hesitated long before holding that the Appellant has established her right to the dower she claimed, if the proof had rested only on the oral testimony of the contract; but they think that that testimony receives very strong support and corroboration from the evidence given of what was usual in the District, and also from the conduct of the Respondents themselves.

The evidence of what was customary principally came from the Respondent's Witnesses, and its truth may, therefore, be relied on. It shows that, in the Province of *Behar*, and in the caste of *Sheikhs*, Rs. 40,000 was amongst wealthy people the usual dower. This amount was not invariable, but it was a very common and usual sum, and numerous instances are cited by the Witnesses. One Witness *Sheikh Shahamut Ally*, says:—"In the caste of *Sheikhs* in the Province of *Behar* and in *Mahoonee* the custom is usually Rs. 40,000 and one gold mohur and the custom of inconsidered dowers is of recent date."

It was pointed out by the learned Counsel for the Respondents that, in some instances, this large amount of dower was fixed in marriages between

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persons, who, apparently, were not wealthy ; but this circumstance rather tends to corroborate the evidence that it was a usual and well-known dower than to rebut it.

Three cases also coming from *Behar*, were referred to from the Reports of the *Sudder Dewanny Adawlut*, where this sum of Rs. 40,000 was the amount of dower. These instances cannot, of course, be regarded as evidence in the cause, but as matter of history they are consistent with the testimony of the Witnesses.

Their Lordships must not be understood to decide, that the evidence of what was customary in the District would be sufficient in itself to fix the amount of dower, for if there had been no evidence of an agreed amount, it would have been necessary to make inquiries into the usual amount of dower in the family of the Appellant ; but it is impossible not to see, that this sum of Rs. 40,000 was a most usual amount to be fixed, and that fact gives probability to the statements of the Witnesses for the Appellant, who proved that such was, in fact, the dower agreed upon on this marriage.

Their Lordships are also disposed to attribute great weight to the presumptions which naturally arise from the conduct of the Respondents. It is plain that, from the pleadings in the Collector's Court, and from other transactions, they became aware shortly after *Sheikh Willayut Ally's* death of the claim for dower, and although they opposed the Widow's claim to possession, showing they were alive to their rights, yet after she had obtained it they took no step for ten years to interfere with her possession.

The proper inference from this conduct is, that



they were aware that she had a claim to a large dower, certainly to an amount far beyond the insignificant sum of 500 *dirrums* which they now set up, and which, of course, must have been discharged long ago, and that they acquiesced in her holding the property for that larger dower. Knowing what her claim was, if they had wished to dispute it and to have real amount ascertained, they might at any time have instituted a suit to obtain the possession of their shares of the estate, if the dower should appear to have been discharged. But they delayed doing so for ten years, thereby rendering the proof of the agreed dower more difficult, and perhaps relying upon that very difficulty.

Whilst the Judges of the High Court treat this conduct of the Respondents as indicating a consciousness on their part that the dower had been fixed at a considerable amount, they do not seem to have drawn the further inference, which we think may be fairly done, that it is also indicative of a consciousness on their part that what the Appellant asserted to be the amount was the true and proper amount: for if that were not so, it might reasonably be expected that they would have taken proceedings at an earlier period to dispute her claim.

In the result, their Lordships have come to the conclusion, that there was an agreed amount of dower on the marriage; and they are satisfied, concurring so far with the Courts of *India*, that the amount of dower set up by the Respondents has been disproved.

Their Lordships further think, for the reasons given, that there is reasonable evidence to support the case of the Appellant to the dower she claims.

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The Appellant also objected to the decree in the suit for possession, because certain tenements alleged to be her private property (in addition to the two tenements found by the Courts below to belong to her) ought to have been declared to be hers. But no evidence could be referred to by the Appellant's Counsel in support of this contention, and there seems to be no ground for impeaching the concurrent decrees of the two Courts on this point.

Their Lordships will humbly report to Her Majesty, that the appeals should be allowed in both suits, so far as they relate to the claim for dower; that the decrees under appeal should be reserved; and that it should be declared in both suits, that the dower agreed to be given on the marriage was the deferred dower of Rs. 40,000 and one gold mohur.

With regard to the suit for possession, their Lordships have considered, whether they ought to advise Her Majesty to direct an account to be taken in that suit; but, considering the way in which the litigation has been conducted, that no account has ever been asked for by the Respondents, that mesne profits were not even claimed in the suit, they think it will be more convenient to follow the course taken in the case of *Ameer-oon-Nissa v. Moorad-oon-Nissa*, cited from 6 Moore's Ind. App. Cases, 211; and to advise Her Majesty that this suit, so far as it prays possession, should be dismissed as against the Appellant, without prejudice to any suit that may be instituted by the Respondents for an account and administration of *Sheikh Willayat Ally's* estate, consistently with the above declaration as to the Appellant's dower.

Their Lordships are further of opinion, that the



Order to be made in the appeal should, as far as possible, provide against the re-opening of any of the questions which have been litigated in these suits; the Order, therefore, which they will humbly recommend Her Majesty to make will be the following :—

That the appeal be allowed, and that the decrees under appeal be reserved, and the following decree be made in both suits :—

That it be declared, that the dower agreed to be given on the marriage of the Appellant with *Sheikh Willayut Ally* deceased was the deferred dower of Rs. 40,000 and one gold mohur; and that the Appellant, being in the possession of the estates of the said *Sheikh Willayut Ally*, is entitled to retain such possession until the whole of what is due to her in respect of such dower has been paid and satisfied.

That it be further declared, that the whole of the property claimed in the suit wherein the Respondents were Plaintiffs, with the exception of *Mouzah Poon-dareek* and *Mouzah Kurareea*, and the sum of Rs. 300 in the decree of the Principal *Sudder Ameen* mentioned, belonged to and formed part of the estate of *Sheikh Willayut Ally* deceased; and that the Respondents, as the representatives of *Mussumat Ruheebun* deceased, are entitled to three-fourths of the said property, subject to the claim thereon of the Appellant in respect of her before-mentioned dower.

That it be ordered, that the suit of the Respondents, so far as it seeks to recover possession of their shares of the said estate, do stand dismissed as against the Appellant, but without prejudice to any suit that may hereafter be instituted by them for an

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account and administration of the estate of *Sheikh Willayut Ally*, or to enforce their rights therein consistently with the above declarations.

That the costs of both the two suits in the *Zillah* and High Courts should be apportioned between the parties, according to the practice of those Courts in cases wherein a litigant is only partially successful; and that the cost (if any) which have been paid by the Appellant under the decrees under appeal should be repaid to her.

That the causes be remitted to the High Court, with directions to carry out this Order.

The Appellant having failed as to part of the subjects of her appeal, no costs will be given in these appeals.

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BABOO LEKRAJ ROY ... *Appellant* ;

AND

BABOO MAHTAB CHAND and others ... *Respondents*.\*

*On appeal from the High Court of Judicature at  
Fort William, Bengal.*

THE questions in dispute between the parties in this case were : First, whether a *Ruffanamah*, or Deed of compromise, was made collusively and fraudulently against the first Respondent, by his Guardian when he was a Minor ; secondly, whether there was any sum owing from the estate of one *Laljee Mull*, which formed the subject matter of the compromise ;

14th & 15th  
Dec., 1871.

Suit against the Guardians of a Minor, to recover moneys alleged to be due from the estate of the Minor's Father. The Guardians compromised the suit and the Deed of Compromise was confirmed

° Present :—Members of the *Judicial Committee*—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith and the Right Hon. Sir Robert Porrett Collier.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

by the Court. After sixteen years, the Minor, being then of age, brought a suit against the Guardians to recover the amount paid under the Deed of compromise, alleging that the former suit was a fictitious one and the compromise fraudulent and collusive between the Plaintiff and his Guardians. On appeal, held, by the Judicial Committee, reserving the judgments of the Courts in *India*, (1) that, in the circumstances, the Guardians, in their discretion, were justified in making the compromise to protect the Infant's estate and (2) that the burthen of proving the allegation that the former suit was fictitious and collusive, was upon the Plaintiff, and in the absence of *prima facie* evidence by him that no debt was due from the Father's estate, the *onus probandi* was not shifted on the Defendants to negative such allegation.



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and lastly, whether the *onus probandi* lay upon the Plaintiff, who sought to impeach the transaction as collusive and fraudulent, of the Defendants.

The facts and circumstances of the case are fully stated in their Lordships' judgment.

The appeal was argued by

Mr. *Field*, Q. C., Mr. *Leith*, and Mr. *W. C. Mazumdar*, for the Appellant, and

Sir *R. Palmer*, Q. C., and Mr. *Doyne*, for the Respondents.

The authorities cited were :—

Upon the question of the power of a Guardian to deal with the estate of his Ward to protect the estate, *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree (a)*, and *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh (b)*; and

As to the presumption of law with respect to the debt arising from the non-production of the account Books, *Gray v. High (c)*.

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 1871.

Their Lordships having reserved judgment, it was now delivered by

The Right Hon. Sir ROBERT COLLIER :—

*Salamut Roy*, a Merchant and Banker, employed *Laljee Mull* as the principal Manager of his business. On the death of *Salamut Roy*, *Laljee Mull* continued to manage the business, of which was carried on

(a) 6 Moore's Ind. App. Cases, 393.

(b) 10 Moore's Ind. App. Cases, 454.

(c) 20 Beav., 219.



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in the name of *Surbeshurry*, the Widow, and *Lekraj Roy*, the infant Son of *Salamut Roy*. *Laljee Mull* adopted *Mahtab Chand*, the infant Son of his Brother, *Inderjeet Mull*, and appointed by Will *Inderjeet Mull* and *Gunga Pershaud*, a *Gomastah* in his service, the Guardians of his adopted Son. *Laljee Mull* died in *August*, 1845, and on the 26th *September*, 1845, a certificate under Act, No. XX. of 1841 was duly granted to the Guardians, notwithstanding the opposition of *Surbeshurry*.

In *January*, 1846, *Surbeshurry*, as the Mother and Guardian of *Lekraj Roy*, instituted a suit against *Inderjeet Mull* and *Gunga Pershaud* to recover from the estate of *Laljee Mull* the sum of Rs. 176,152. 7as. 4p., being the amount of alleged defalcations or misappropriations on the part of *Laljee Mull*. After various proceedings had taken place in this suit, and Witnesses had been examined on both sides, it was settled by a *Ruffanamah*, or deed of compromise, whereby it was agreed that Rs. 74,000 should be paid by the Defendants, in instalments. This *Ruffanamah* was filed on the records of the Court on the 11th of *January*, 1847, and confirmed by a decree.

*Mahtab Chand* came of age in *October*, 1861, and on the 3rd *January*, 1863, commenced the present suit against *Lekraj Roy*, the Son of *Surbeshurry* (who had died in 1850) to recover from him, all that had been paid, together with interest thereon, under the above Deed of compromise, amounting to Rs. 68,753. 15 a. 6 p., on the ground that the suit of 1846 was a fictitious one, and that the



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compromise of it was fraudulent and collusive between *Surbeshurry* and the Guardians of *Mahtab Chand*.

Judgment was given in the Plaintiff's favour, to the full amount of this demand, in the *Zillah* Court; and that judgment was subsequently affirmed in the High Court. Against this judgment the Defendant appeals.

There is no allegation of fraud against the Defendant, who, at the time of the transaction which is impeached, was a child of ten years old. The Plaintiff took upon himself the burden of establishing fraud and collusion on the part of the Defendant's Mother, and his own Guardians, one of whom was his natural Father. It was contended that, inasmuch as the Guardians were dealing with the property of an infant, it was incumbent on the Defendant to show that such dealing was for the infant's benefit; and the case of *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 393), followed by *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* (10 Moore's Ind. App. Cases, p. 454), were referred to in support of this proposition. But it is to be observed that, in the latter case, fraud on the part of the Guardian was clearly established, and that in the former, the question turned on the power of Guardians to charge an infant's estate by way of loan or mortgage, whereas no such power is here in question, inasmuch as it was the manifest duty of the Guardians, who were also Administrators of the estate (having received a certificate in pursuance of



Act, No. XX. of 1841), to pay all just debts of the Testator.

Their Lordships have carefully examined the evidence on the part of the Plaintiff, and are unable to find in it anything amounting to proof, that either the institution of the suit, or the compromise, was fraudulent or collusive. Although the greater part of the proceedings in that suit have been destroyed, it is sufficiently plain from what remains that it was to all appearance a contested suit, and that it had proceeded to the point of depositions being taken on both sides before it was compromised under a decree of the Court. The evidence by which the Plaintiff seeks to set aside that decree which had been in force for sixteen years is, that *Gunga Pershaud* filled the double character of Guardian of the Plaintiff and *Gomastah* to *Surbeshurry*, that *Inderjeet Mull* a man of weak understanding, under the influence of *Gunga Pershaud*, and that it was publicly known at the time that the settlement was unjust. The latter description of evidence was inadmissible, while the former could at the most raise a certain amount of suspicion, not approaching to proof, or even presumption of the *mala fides* of *Gunga Pershaud*, while, on the other hand, there is a strong presumption against *Inderjeet Mull* entering into a conspiracy for the purpose of defrauding his own Son.

Their Lordships have further examined the evidence of the Defendant, with a view to ascertain, whether it supplies the defect of proof on behalf of the Plaintiff. It undoubtedly appeared that the Defendant absented himself in order to escape ex-

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amination, that he withheld the account-books in his possession until peremptorily required to produce them, and abstained, without explaining why, from calling some persons still alive who are described as forming an assembly of Arbitrators, to whom the accounts of *Laljee Mull* were submitted before the compromise in the former suit. It is further stated by the Judge of the *Zillah* Court, that the accounts when produced disclosed upon the face of them only a balance of about Rs. 18,000 as due from *Laljee Mull*, upon which two observations arise—first, that whatever the defalcations of *Laljee Mull* may have been, they would not necessarily have appeared on the mere inspection of the Books; and, secondly, that if a defalcation to the above amount appeared on *Laljee Mull's* own showing, the Defendant would be entitled to retain at the least that amount. We do not dwell on the deposition of the Witness called by *Gunga Pershaud*, apparently with the view of contradicting the Plaintiff's case, which was, that *Inderjeet Mull* was a tool in his (*Gunga Pershaud's*) hands, and of exonerating himself by throwing the whole responsibility of the transaction upon *Inderjeet Mull*. Although the Plaintiff, if he had proved a case of fraud, might have been justly entitled to contend that it was not answered by that of the Defendant, still their Lordships cannot regard the case of the Defendant as supplying that proof of fraud which the Plaintiff failed to adduce, and without which the compromise of 1847 could not be set aside. It is undoubtedly the duty of Guardians scrupulously to regard the interest of Minors in dealing with their



estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail, that Guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill-founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after sixteen years without distinct proof of fraud.

Their Lordships fully subscribe to the rule which has been more than once laid down, that a very strong case on the part of the Appellant is required to induce them to set aside the finding of two Courts on a question of fact. In this case, however, they are of opinion, that the Judge of the *Zillah* Court fell into an error in point of law, in assuming that the burden of proof of the debt lay upon the Defendant. The burden of proving his allegations that the suit was fictitious and the compromise fraudulent and collusive lay upon the Plaintiff; and an element in that proof, without which his case amounted to nothing, was the non-existence of a debt. It rested, therefore, with him to give, at all events, some *primâ facie* evidence of this before the burden of proof was shifted to the Defendant. Inasmuch as this error seems to have influenced the decision of both the Indian Courts, who, in the opinion of their Lordships, have given undue weight to the non-appearance of the Defendant (a mere child at the time of the transaction in question), and to his reluctance to Produce the Books, their Lordships

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consider that they are not infringing the rule above referred to by deciding in favour of the Appellants.

On these grounds their Lordships will humbly report to Her Majesty, that the decrees of the High Court and of the *Zillah* Court ought to be reversed, and that in lieu thereof a decree ought to be made dismissing the Respondent's suit with costs, and their Lordships will direct that the Appellants have the costs of this appeal.

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CASES  
IN  
THE PRIVY COUNCIL  
ON APPEAL FROM  
THE EAST INDIES.

HYDER HOSSAIN ... *Appellant* ;

AND

MAHOMED HOSSAIN and ALI HOS- } Respondents.\*  
SAIN ... .. }

*On appeal from the Court of the Judicial Commissioner of Oude.*

THIS appeal was preferred from an Order of the Court of the Judicial Commissioner of *Oude*, dated the 2nd of *December*, 1868. That Order confirmed a

23rd Dec.,  
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14th Jan.,  
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° Present :—Members of the *Judicial Committee* :—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.  
*Assessor* :—The Right Hon. Sir Lawrence Peel.

The mere fact that a member of a Mahomedan family in *Oude* was, for fiscal purposes

registered as sole owner of an estate, is not evidence of his exclusive right to the property. Such presumption from registration may be rebutted by evidence showing that the property was enjoyed in common by the family.

*Semble* : Act, No XVI. of 1865 passed after the institution of proceedings before the Land Revenue Officers in *Oude* has a retrospective operation. In the absence of substantial error, either in the finding of the facts,



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previous Order of the same Court, made on the 16th of *September*, 1868, and reversed the Order of the two lower Courts, by which the Order of the Court of first instance in favour of the Respondents had been set aside.

The parties were Mahomedans, and their rights in respect to succession regulated by Mahomedan law.

The controversy in this litigation was as to the Respondents' hereditary title to one-half of the village of *Beloulee*, in the Province of *Oude*, which was registered in the sole name of *Ahmud Hossain* (who died pending the appeal and was represented by the Appellant), and their consequent right to have such title recognized in the papers of the land Settlement of *Oude*, which was in progress at the time of the occurrence of the dispute. The village of *Beloulee* was admitted to have formerly belonged to one *Sheikh Aleemoollah*.

The object of the suit, the issues raised, and the various stages of the proceedings in the Courts below so fully appear in their Lordships' judgment as not to require any further statement.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant.

Their Lordships, without calling on

Mr. *Doyne*, who appeared for the Respondents,  
Delivered judgment by

The Right Hon. Sir JAMES COLVILE :—

This is one of the appeals that have lately been

or in the principles of law applied in cases depending on local customs and local inquiry before the Land Revenue Officers in *Oude*, where the proceedings are not strictly conducted, the Judicial Committee will look to the merits and apply the rule not to disturb the judgment appealed from, unless they are satisfied that the judgment is materially wrong.



brought from Judgments or Orders of the Revenue Officers engaged in making the Settlement of the land Revenue for the Province of *Oude*. The present case has been before several of the Revenue authorities, who have passed conflicting decisions upon it.

In *October*, 1864, the Respondents claimed to be entitled, as Proprietors, to one moiety of a village named *Beloulee* with its appurtenant Hamlets, and to be treated accordingly in the Settlement then in progress. This claim was originally advanced by distinct complaints or petitions in respect of different Hamlets, but these were consolidated into one suit by an Order of the extra Assistant Commissioner, *Mahomed Hossain Khan*, dated the 23rd of *February*, 1866; and the subject matter of the litigation may be treated as the village *Beloulee*.


The title asserted by the Respondents was, that the village had originally belonged to one *Sheikh Alleemoollah*, their great Grandfather; that he had a Daughter, *Khyreeyutoonissa*, who left two Sons, viz. *Lootf Hossain*, the Father of the original Appellant, and *Enayut Hossain*, the Father of the Respondents, who, as his representatives, were the proprietors of an undivided moiety of the village.

The case of the Appellant was that, on the death of the common ancestor, *Sheikh Aleemoollah*, the entire interest in the village had somehow become vested in his Widow; that she, about the end of the last century, transferred it by Deed of gift to *Lootf Hossain*, who thenceforward held it as sole proprietor up to the time of his death, when it passed to his Son, the Appellant; and that during all that period the Respondents and their Father had no proprietary interest

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in it, being at most dependents of the other branch of the family.

It was admitted, or hardly disputed on the part of the Respondents, that, after *Sheikh Aleemoollah's* death, his Widow first, and after her death *Lootf Hossain*, and after him the Appellant, had been registered as the persons responsible for the revenue assessed, from time to time, on the village ; and so far, as the ostensible proprietors of it. But it was insisted, that this was merely an arrangement for fiscal purposes (a), and that notwithstanding the registration in the name of one member of the family on behalf of the others, both branches continued jointly to possess the village, and to enjoy the revenues of it.

It is to be observed, that a suit so farmed, though tried by the Revenue authorities, and in the course of proceedings for effecting a Settlement of the public revenue, does not, in the Province of *Oude*, merely determine who is to be *Lumberdar*, or the person entitled to engage for the payment of revenue, leaving the party excluded a remedy in the Civil Courts. Under the provisions of Act, No. XVI. of 1865, which, though passed after the commencement of this particular suit, seems to have a retroactive effect, such a suit involves a final adjudication on the question of proprietary right.

The following was the course of the litigation now brought under the review of their Lordships :—

The issues originally settled in the suit were,

First, did the Plaintiffs (the Respondents) ever receive the profits of the village or not ?

Secondly, did the Plaintiffs live in common with the Defendant or separately ?

(a) See *Mussumat Thurkrain Sookraj Koojar v. The Government*, ante, p. 112.



Thirdly, did the Defendant give the Plaintiffs Rs. 881 for their Sister's marriage, in 1264 F. or not ? and

Fourthly, did *Mussumat Hyat Bebee* make over this village with others to the Defendant's Father *Lootf Hossain*, and cause the engagement to be executed in his name, in virtue of which he remained in sole possession without the partnership of *Enayut Hossain*, and after his Father's death, did the Defendant himself remain in uninterrupted possession, or not ?

On the 1st of *February*, 1866, *Mahomed Hossain*, the extra Assistant Commissioner, decided the case in favour of the Respondents.

On the 19th of *June*, 1866, this decision was reversed by the Settlement Officer, Major *Chamier*, on the ground that it was partly based upon the result on inquiries made out of Court, and the case was remanded for trial on the following issues :—

First, whether up to 1263 F. ( 1856 ) commensality existed between Plaintiffs and Defendant, and did Plaintiffs participate in the profits ?

Second, if so, did the Plaintiffs enjoy a portion of profits by right or by favour ?

Third, whether estoppel was created by the Plaintiffs having enjoyed *Seer* ?

On the 7th of *May*, 1866, *Mahomed Hossain*, having tried these issues, again decided the case in favour of the Respondents.

There was a second appeal to the Settlement Officer, who, on the 19th of *June*, 1866, reversed the decision of this native Officer and dismissed the Respondents' claim.

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The Order was confirmed on appeal by the Commissioner of the *Lucknow* Division (Major *Barrow*) on the 21st of *September*, 1866.

The cause, in the ordinary course of things, would next have gone before the Financial Commissioner, but Major *Barrow* having been intermediately raised to that office, it was transferred to the Judicial Commissioner, Sir *George Couper*, who, on the 16th of *September*, 1868, proceeding mainly on a recent decision of the late Financial Commissioner, Mr. *Davies*, reversed the Orders of Major *Chamier* and Major *Barrow*, and affirmed the decision of the Court of first instance in favour of the Respondents.

This ruling was afterwards reviewed by Mr. *Tucker*, who succeeded Sir *George Couper* as Judicial Commissioner, and was confirmed by him on the 2nd of *December*, 1868.

These conflicting judgments, and the argument addressed to their Lordships on behalf of the Appellant, clearly show, that the question between the parties is not merely one of fact, but one involving the *ratio decidendi* in cases of the like nature.

The judgments of Major *Chamier* and Major *Barrow* proceed upon certain former rulings of the Revenue Courts in *Oude*. These are not before their Lordships, but their effect seems to be, that the principle of the Settlement was to be based on the maintenance of the proprietary right as it existed prior to, and at the time of the annexation of the Province to *British India* in 1856 ; that if, under the Kings of *Oude*, one member of the family had been registered as the sole Owner of the estate, and the



person responsible for the revenue assessed upon it, it lay upon those who claimed to be jointly interested in it to show, not merely that they had received some indefinite and casual sums out of the profits, or even certain *Seer* lands by way of maintenance, but that the ostensible Owner of the estate had accounted to them for the aliquot share of its profits receivable by the Owners of the share claimed. These two Officers seem accordingly to have come to the conclusion that, inasmuch as the proof of joint interest, given by the Respondents in the Court of first instance to whatever it amounted, fell short of this, their claim ought to be dismissed, and the ostensible title of the Appellant allowed to prevail.

The decision, however, of Mr. *Davies*, on which the Judicial Commissioners proceeded, is admitted on all hands to have qualified the former rulings.

In that case it appeared, that the party claiming a joint interest against the party who was the ostensible proprietor, had held 71 *beegahs* *Seer* land, and had also received sums averaging Rs. 86. And Mr. *Davies*' judgment, after stating the question to be, whether the Respondent had, by the adverse possession of the Appellant, been excluded from his inheritance under the Mahomedan Law, proceeds thus: "Under the Mahomedan Law, Grandsons are entitled to equal shares. Under the custom of the Country one Shareholder represents the family before the Government, and manages the estate. It is by no means a general practice to give each sharer an account of his share of the profits at the close of the year. No safe inference against a Shareholder can be made from the omission. It was very frequently the case for acknowledged sharers to take

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only a sufficient sum for their own expenses ; but this involved no relinquishment of their rights, nor did any cause of action arise until some quarrel took place between the parties." And from these propositions he inferred, first, that there was a legal presumption in favour of a Grandson claiming against another Grandson, and that the *onus* of proof should properly be placed on the one claiming to be sole possessor, contrary to law and custom ; and, secondly, that in the case before him the Appellant had cut the ground from under his feet by paying to the Respondent, in addition to *Seer*, a sum of money of a fluctuating amount.

If their Lordships are called upon by the present appeal to overrule the decision of Mr. *Davies*, and to restore the rule supposed to be established by the earlier cases, they must decline to do so. That decision, after full discussion, was followed in this present case both by Sir *George Couper* and by Mr. *Tucker* ; the principle which it lays down, having been thus sanctioned, has probably governed other Settlement cases since decided ; and it appears to their Lordships to be far more consistent with equity and common sense than a hard and fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits. In so far as it depends upon the custom of Mahomedan families holding lands within the former kingdom of *Oude*, it receives some corroboration from the findings of the Mahomedan Officer (presumably conversant with such customs) who tried this case, in the first instance, before the date of Mr. *Davies'* judgment.



It remains to be considered, whether the principle of that judgment has been correctly applied to the present case.

It was argued for the Appellant, that he has not been allowed an opportunity of proving the alleged Deed of gift to his Father. There was nothing, however, to prevent him from proving this Deed, if he had the means of doing so, on either of the two trials before the native Officer. He chose, however, then, to rest his case on the Order, or copy of the Order, which, at most, proves no more than that, with the consent of the family at the time, the village, which had been entered in the Revenue Register in the name of the Widow of *Sheikh Aleemoollah*, was transferred into that of *Lootf Hossain* on the suggestion that he had been appointed by her as her successor. Their Lordships apprehend that such an arrangement was not uncommon; nor, if proved, would it, under the ruling of Mr. *Davies*, or even according to the stricter rule of their earlier cases, be conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property. The decisions differ only as to the degree of proof required, and as to the party on whom the burthen of proof lies.

It is no doubt true that, before Major *Chamier*, the Appellant's Pleader proposed to give further evidence in support of his client's title under the alleged Deed of gift; and that that Officer, who had decided the other issues in favour of the Appellant, refused to admit it, stating, "I consider that the fresh plea of gift should not be entertained at this late stage of the case." But their Lordships are far from think-

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ing that this refusal would have been improper had the decision of the Settlement Officer on the merits been the other way. And, however that may be, it appears to them that no substantial injury has been done to the Appellant by it. For it is clear, that the real issue between the parties is, whether, notwithstanding the title registered on the Revenue records, both branches of the family continued, as a joint family, to possess and enjoy the village. If that were made out, very little credit would be due to an ancient Deed of gift, by whatever proof supported, since it would be inconsistent with the proved possession and enjoyment of the estate.

Have then joint possession and enjoyment been established in the degree which satisfies the ruling in Mr. *Davies'* case? Their Lordships are not insensible to the looseness of much of the evidence taken before the native Officer. But they are of opinion, that there was before him legal evidence which (if believed) would warrant his findings, at least to the extent that the *Seer* land was enjoyed by the Respondents of right and not by favour, and that their *status* was not that of dependents but of co-proprietors, although the sums drawn by them from the profits may have fluctuated in amount, and not have been the subject of a regular accounting. This would satisfy the ruling of Mr. *Davies*, though it might not satisfy the requirements of the earlier cases on which Major *Chamier* and Major *Barrow* proceeded.

Their Lordships, in considering this appeal, have felt that, in cases of this nature, wherein the procedure is somewhat loose, and the merits depend



much upon local custom and local inquiry, it is even more necessary than it is on appeals from the decisions of the Civil Courts in the Regulation Provinces to act on the principle of not disturbing the judgment under appeal unless they are satisfied that it is substantially wrong.

Here, after full consideration of the arguments for the Appellant, they have been unable to satisfy themselves that there is substantial error, either in the finding of the facts or in the principle of law that has been applied to them, and, therefore, they have come to the conclusion that, without calling on the other side, they ought to advise Her Majesty to affirm the Decree or Order of the Judicial Commissioner of *Oude* and dismiss this appeal with costs.

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MUSSUMAT ANUNDEE KOONWUR, }  
 Widow of GUNPUT LAL ... } *Appellant,*

AND

KHEDOO LAL ... .. *Respondent;*

AND

MUSSUMAT MANKEE KOONWUR... *Appellant,*

AND

KHEDOO LAL ... .. *Respondent ;*

AND

MUSSUMAT POONPOON KOONWUR *Appellant,*

AND

KHEDOO LAL ... .. *Respondent.\**

*On appeal from the High Court of Judicature, at  
 Fort William, in Bengal.*

16th, 17th  
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Cases of  
 commensality  
 is strong  
 though not  
 conclusive,  
 evidence of  
 partition of  
 joint family property,  
 and removes or qualifies the presumption of  
 Hindoo Law, that the acquisition of property by a member of the family  
 is made by means of the joint estate, but the *onus probandi* lies on a  
 member of the family setting up separation to prove that the property  
 was acquired by himself after separation, and not from estate of the joint  
 family.

THESE consolidated appeals were brought from a  
 decree of the High Court, which reversed a decree  
 of the Principal *Sudder Ameen* of Behar.

° Present :—Members of the *Judicial Committee* :—The Right  
 Hon. Sir James William Colvile, the Right Hon. Sir Montague  
 Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*Assessor* :—The Right Hon. Sir Lawrence Peel.



The Respondent was the Plaintiff in the Court below, and the object of the suit was to obtain a declaration of his right to a share of an estate which he claimed to be joint family property, and to have his share allotted to him; the Defendants contending that it was not joint property, but their separate acquisition after the separation of the family.

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 ?  
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The facts and the argument on the appeals, which were heard together, are fully stated in their Lordships' judgment.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellants; and

Mr. *Cowie*, and Mr. *J. D. Bell*, for the Respondent.

In the course of the arguments, 1 *Strange's* "Hindu Law," pp. 199, 200 [Ed. 1830], was referred to, as showing from the evidence in the suit that the family was a divided Hindoo family, and *Strange's* "Hindu Law," Vol. I., pp. 131, 166, 188, as to the presumption of death after twelve years' absence.

Judgment was reserved and now delivered by

The Right Hon. Sir JAMES COLVILE :—

26th March,  
 1872.

In this case three distinct appeals against a Decree

A Hindoo had only self-acquired estate. Previous to his death his three Sons separated in food and left their Father's house, living separately. Held, that although there was a cesser of commensality, the normal condition of an individual Hindoo family did not, from the evidence, operate as a complete separation, and property purchased after the separation in the name of one of the Sons, and business carried on in the Son's name, declared to be *benamee*, and that the same and the profits derived from the business formed part of the joint family estate.

If no intelligence is received during twelve years, concerning the existence of a man who has travelled to a Foreign Country, the presumption by Hindoo Law is that he is dead.

Where a member of a joint Hindoo family, of weak mind, went on a pilgrimage, and was not heard of for twelve years, and his death, therefore, presumed, his share of the family estate by the *Mithila* law falls into the general estate, and his Widow is entitled only to maintenance.



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of the High Court of Bengal have been consolidated, and heard as one appeal. The principal questions raised are, what was the *status* of the Hindoo family of which the Appellants and the Respondent were members; and whether certain acquisitions are to be regarded as part of the estate of the late head of the family, or as the separate property of the individual member in whose name they stand, and by whom they were ostensibly acquired.

The following is the history of the family in question. *Choonee Lal*, the Father, who died in *October*, 1854, had for many years carried on business as a cloth Merchant at *Sahibgunj*, in *Zillah Behar*, within that part of *India* in which Hindoos are governed by the *Mithila* Law. At the time of his death this business was carried on in his sole name; but he had previously, and up to the year 1851 or 1852, been in partnership, first with one *Rhadha Lal*, and, after the death of that person, with his Son, *Sreekrishen*.

All parties are agreed, that he had no ancestral estate, and that whatever property belonged to him was of his own acquisition. He had three Sons, viz:—*Gopal Chund*, the Respondent, *Khedoo Lal*, and the Appellant, *Gunput Lal*. About 1839, and after his Sons had reached man's estate, he married a second Wife, who survived him.

*Gopal Chund*, the eldest Son, became of unsettled, if not of unsound mind, in or before the year 1848, when he left his home as a *Beiragee*, or religious mendicant, and wandered away on pilgrimage, to various holy places. His Wife, the Appellant, *Mussumat Mankee Koonwur*, tendered some evidence in this suit to show that he had been seen alive as



late as 1858, and might be still alive ; but both the Indian Courts, discrediting that evidence, have come to the conclusion, that he had not been heard of for twelve years before the date of the first Decree ; and proceeding on the presumption of Hindoo Law, have treated him as then dead (a). There is nothing however to show that he did not survive his Father. He had no male issue, and is represented on the record by *Mussumat Mankee Koonwur*, who if he be dead, would, as his Widow and heiress, be entitled to succeed to his separate estate.

*Gunput Lal*, the younger Son, has died since his appeal from the decree of the High Court was allowed. He, too, had no Male issue, and his appeal has been revived by his Widow and heiress, *Mussumat Anundee Koonwur*. He left, however, a Daughter, *Mussumat Poonpoon Koonwur*, who has an infant Son, *Lulloo Baboo* ; and she is an Appellant against the Decree in respect of the interest which she claims in part of the property in dispute. *Khedoo Lal*, the Respondent, and the Plaintiff in the suit, has at least two Sons, *Brij Bhookun Das*, and *Muhammed Lal*, of whom mention is made in the suit, but who are not parties to it.

From this statement of the family it follows, that the property of which *Choonee Lal* died possessed, whatever it was, descended to his Sons living at the time of his death, in equal shares. If *Gopal Chund* were then dead, the estate would descend to *Khedoo Lal* and *Gunput Lal* in equal moieties. And even if *Gopal Chund* is to be taken to have survived his Father, but to have died subsequently, and before a partition, his

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(a) See Strange's "Hindu Law," Vol. I., p. 188.



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share, according to the *Mithila* law, would pass to his Brothers, to the exclusion of his Widow, who would be entitled only to maintenance. This does not appear to be contested. The question in dispute is, which, if any, of the various acquisitions of the family, standing in the separate names of different members of it, are to be treated as part of the estate of *Choonee Lal*, and descendible to his heirs.

The suit was commenced by the Respondent on the 1st of *November*, 1859. It was originally brought against *Gunput Lal* and his Daughter, *Mussumat Poonpoon Koonwur*, described as the Mother and guardian of *Lulloo Baboo*; and the plaint treated the share and interest of *Gopal Chund* vested in his two Brothers. The Appellant, *Mussumat Mankee Koonwur*, however, intervened as an Objector in respect both of the share in his Father's estate to which *Gopal Chund*, if alive, was entitled; and of that part of the property claimed, which she insisted was his separate estate. And by an Order of the Principal *Sudder Ameen*, in whose Court the suit was brought, she was made a Defendant.

The plaint claimed a moiety of all the property specified in the schedule annexed to it, and valued at upwards of two lacs of rupees, the Respondent alleging that he had been dispossessed of it. Some objections have been taken to the frame of the suit on the ground that the Respondent has not included amongst the subjects of it that property which is held by him and his Sons in their respective names. But their Lordships are of opinion that, on a fair construction of the plaint in connection with the Respondent's written statement, which will be afterwards referred to, it must be held that he



does offer to account for the whole of what is so held as part of his Father's estate.

The plaint, though it prays for delivery of possession, seems to be framed rather with a view to obtain a declaration of the partibility of the disputed subjects, than to carry out a partition by metes and bounds of the estate to be consummated by the delivery of actual possession.

The following are the issues settled in the suit:—

First, whether, according to the statement of the Plaintiff, the whole of the property in dispute belongs to the paternal estate and is undivided; or whether, according to the averment of *Gunput Lal* and *Mussumat Mankee Koonwur*, Defendants, part belongs to the paternal estate, and part has been acquired by *Gunput Lal* and *Gopal Chund* during the time of their separation and messing apart.

Second, whether the property mentioned in the written statement of *Mussumat Poonpoon Koonwur* belongs to her or not.

Third, whether *Gopal Chund*, the Husband of *Mussumat Mankee Koonwur*, is missing, or whether he is residing near or in the North-western Provinces; and if he is missing, whether the claim of the Plaintiff to a moiety is right or not: and,

Fourth, whether the estimate of the effects, and goods and chattels in litigation, and the amount expended, is correct or not.

Before considering these issues and the evidence applicable to them, their Lordships think it desirable to pursue the history of the family.

It is admitted on both sides that, when his two elder Sons came of age, *Choonee Lal* opened for each a separate Cloth shop, and established him in it.

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The precise dates at which these shops were opened are not quite certain. The Respondent admits them to have been in existence before 1835, and the Appellants insist, that they were established before 1829.

According to *Mewa Lal* a Witness for the Respondent and the Brother of his step-mother, they were established in the years 1829 and 1831. The Respondent appears to have followed his Father's example and to have opened two other Cloth shops, one in the name of each of his Sons. He insists, however, that all these shops and their profits were and are part of *Choonee Lal's* estate; whilst the Appellants, of course, contended that each was and is the respective property of the person in whose name the business was carried on, *Choonee Lal* having no interest therein. *Gunput Lal*, the third, remained for some time in the Cloth shop of *Choonee Lal* and *Rhadha Lal*, but, as he says, only as a *Gomastah* employed at a salary of Rs. 50 *per mensem*. Afterwards, and about the year 1844, a banking firm was opened in the names of *Gunput Lal* and *Sreekrishen Lal*, which was carried on in their names until 1850, when *Sreekrishen Lal* retired, and the business was thenceforward, and until the death of *Choonee Lal*, carried on in the names of *Choonee Lal* and *Gunput Lal*. The question what interest, if any, *Choonee Lal* had in this concern is one of the material issues in the cause; the Respondent contending, that the beneficial interest in the half-share during the partnership with *Sreekrishen Lal*, and the whole interest after the dissolution, belonged to *Choonee Lal*; the Appellant insisting, that he never had any interest in that *Kotee*, the half-share originally, and afterwards the whole, being the separate and self-acquired



property of *Gunput Lal*. Again, both parties are agreed that, at the time of the death of *Choonee Lal*, his three Sons had ceased to live in commensality with him, or with each other. But the time at which such separation took place is in dispute, the Appellants contending, that it was complete in 1829, and the Respondent insisting, that each Brother withdrew from the state of commensality with his Father at a different time, *viz.*, *Gopal Chund* about the year 1839, the Respondent about 1846, and *Gunput Lal* as late as 1852.

The state of the landed property standing in the names of the different members of the family is as follows :—

The Respondent, in his written statement, says that *Mouzahs Budem*, and *Hurchundpore*, and *Rughoonathpore*, and *Jhekutea*, in *Pergunnah Kotumba*, and two Houses and a Coachhouse situate in Street, No. 4 of *Sahebgunj*, were all acquired with the profits of the Cloth-dealer's shop bearing his name, and were then "under his control." These, as was before stated, do not form part of the properties specified in his plaint; but they are covered by the general conclusion of his written statement, which is in these words: "The conclusion is, that all the properties and effects, and moneys, and common articles of this estate bearing the name of your Petitioner's Father, or of any of the Brothers, or of any of the Sons, constitute the estate left by, and that acquired with the funds of, my Father." Of the landed properties specified in the plaint, some are admitted to be part of *Choonee Lal's* estate. But as to the rest, *Mouzah Tilhara* and an upper-roomed House in *Sahebgunj*, in which

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the banking *Kotee* has been carried on, are claimed by *Mussumat Mankee Koonwur* as the separate and self-acquired property of her Husband, *Gopal Chund*. Other parts are alleged to be the separate and self-acquired property of *Gunput Lal*; whilst the several properties specified in her written statement are claimed by *Mussumat Mankee Koonwur* as "her exclusive property, with which neither the Respondent nor *Gunput Lal* has any concern."

Before considering the conflicting claims to these properties, it seems to their Lordships to be desirable to ascertain and determine, if it be possible, when the Brothers first became separate in food from their Father and each other—in other words, when that commensality, which is the normal condition of an undivided Hindoo family, ceased.

The finding of the High Court on this point is as follows :—

"We are of opinion that, from the admissions of the parties, and the dates of the purchases of the Houses in which the different Sons were established by their Father, three Sons began to live separate from their Father at different dates, concurrent with or subsequent to their Father's second marriage in the year 1246 (A.D. 1839), in which year the eldest Son, *Gopal Chund*, got a House to himself, while *Khedoo Lal* and *Gunput Lal* went into separate Houses in the years 1253 (A.D. 1846) and 1259 (A.D. 1851) respectively. We think, too, that there was from those dates an undoubted separation in food between the Father and each Son as he left the paternal house." The Appellants contend that, as early as 1829, the three Brothers had all become separate in food from their Father and from each



other, and have argued at the Bar that the fact has been so found by the Principal *Sudder Ameen*.

The judgment of the Principal *Sudder Ameen* does not, as their Lordships read it, expressly fix the date of the separation; but its general effect is undoubtedly on this point more consistent with the case of the Appellants than with that of the Respondent. The evidence in the cause is conflicting and far from satisfactory. The finding of the High Court seems to proceed upon the several dates of the purchases of the Houses in which the three Brothers ultimately came to live; and to assume that each Brother withdrew singly and at a different time from the state of commensality. This does not appear to their Lordships to be probable. On the other hand, the Witnesses for the Appellants, speaking with the usual inaccuracy of native Witnesses as to time, are not agreed as to the date of the separation. *Thanoo Chowdhree* puts it as late as 1834; *Goureesunkur* makes it as late as 1832. On the other hand, *Gunga Ram Kandoo*, though a Witness produced by the Respondent, supports, on this point, the case of the Appellants. *Mewah Lal* says, "I do not recollect the year, but when the family increased *Choonee Lal* provided his Sons with separate Houses and paid their expenses." On the evidence, their Lordships are by no means satisfied that the separation took place so early as 1829. On the other hand, they do not think that the date of each Brother's separation can safely be determined by the date of the purchase of the House in which he ultimately lived. They are disposed to think, that the separation took place on or shortly after the second marriage of *Choonee Lal* in 1839.

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Another observation which arises upon the evidence in the cause, is that this cesser of commensality, whenever it took place, does not appear to have operated as a complete separation of the different members of the family, or to have prevented *Choonee Lal* from continuing to exercise many of the functions which would ordinarily belong to the head of an undivided Hindoo family. The whole family continued to reside in the same Town. Some of the Witnesses depose that marriages and other family ceremonies continued to be performed in *Choonee Lal's* House, and at his expense, as they would have been had no separation taken place. And this testimony is confirmed in the case of the marriage of *Mussumat Poonpoon Konwur*, the Daughter of *Gunput Lal*, by a passage in the correspondence which will be afterwards referred to. Again, it appears by the evidence, that after *Gopal Chund* went away, his separate establishment was broken up, and his Wife and family returned to live under the same roof with *Choonee Lal*.

The cesser of commensality is only material to the determination of the issues in the cause, in so far as it removes or qualifies the presumptions which the Hindoo Law might otherwise raise, that an acquisition made in the name of an individual Son of the family was made by the head of the family, and as part of the family estate. According to their Lordships' view of the evidence, it is not proved to have taken place at the date of some of the acquisitions which are in question in this suit; and the effect to be given to it, in weighing the conflicting evidence concerning transactions of a date subsequent to that at which it took place, is necessarily



diminished by such evidence as that which has been just referred to.

Their Lordships will, in the first instance, following herein the example of the High Court, consider the evidence touching the earliest of the acquisitions in question—*Mouzah Tilhara*.

That the property was purchased in the year 1835, at a revenue sale, in the name of *Gopal Chund*, for Rs. 4,400. Their Lordships, for the reasons above-stated, are disposed to believe that at the time, the cesser of commensality relied upon had not taken place. They will, however, consider the evidence relating to this property, independently of any presumptions which might arise from the fact that the family was then joint in food. It may further be admitted, that there is no documentary evidence corroborative of the assertion made by some of the Respondent's Witnesses that the purchase money was paid out of the funds of *Choonee Lal*; and further, that if the Shop carried on in the separate name of *Gopal Chund* was his own separate property, he may well at that date have been in a position to pay out of the accumulated profits of that Shop a sum of Rs. 4,400. It happens, however, that we have evidence concerning the enjoyment of this estate, which is wanting as to the other properties in dispute.

It has been proved, that this property between the years 1841 and 1855-56, was under several successive leases demised to *Nundcoomar* (one of the Respondent's Witnesses, and the Brother of *Choonee Lal's* second Wife), sometimes jointly with other persons, sometimes alone. One of the leases, that granted to *Nundcoomar* on the 10th of *December*,

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1849, of course purports to be granted in the name of *Gopal Chund*, and is signed by him. But it is also countersigned by *Choonee Lal*. It was, indeed, suggested at the Bar, that the *Choonee Lal* whose name is so subscribed, being described as *Putwarree* of *Mouzah Sahibgunj*, was not the Father of *Gopal Chund*, but some other person of the same name. Their Lordships, however, see no reason for adopting that conclusion. A circumstance of far more importance is, that *Nundcoomar* has produced a long series of Letters addressed to him as tenant of this property by *Choonee Lal* in his lifetime, and after his death by *Gunput Lal*. The genuineness of these Letters their Lordships have no reason to doubt. They cover a period from the years 1841 to 1856-57, when the tenancy of *Nundcoomar* terminated. Many of them, therefore, are anterior in date to the years 1848, when *Gopal Chund* left his home, and were written at a time when there is no reason to suppose he was of unsound mind or incapable of managing his affairs. It is, however, impossible, in their Lordships' opinion, to read these Letters without coming to the conclusion, that they were such as the real Owner of the estate would write to his tenant, and that they are inconsistent with the case made by the Appellants, viz., that *Kusba Tilhara* was the separate property of *Gopal Chund*, and was only managed for him and his family after his insanity had declared itself, first by his Father and afterwards by his Brother, *Gunput Lal*. In the earlier years, rent and produce are acknowledged by *Choonee Lal* as received by him on his own account, without reference to *Gopal Chund*.

In the Letter, which is dated in 1252 or 1845, A.D.



he writes : " Pay *Meer Gholam* 6 rupees for rent of Shop occupied by *Baboo Gopal Chund* for three months, and place it to my account, and it will be deducted from the rents."

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In the Letter, which is dated in 1845, he complains of the rent being in arrear ; requires 800 C. Rs. to be sent immediately, and says, " Do not delay, as I am desirous of sending the revenue to *Patna*. Till the revenue is sent and the receipt taken my mind is not at ease, because it affects my landed property." A Letter written in 1843 is cited by the Judges of the High Court. It may be inferred from it both that *Choonee Lal* as the head of the family, was about to celebrate the marriage of *Mussumat Poonpoon Koonwur*, the Daughter of *Gunput Lal*, and that he was requiring the tenant of *Kusba Tilhara* to send part of the produce of the estate to be used on the occasion.

In the Letter written in 1852, he reproaches *Nundcoomar* with being in arrear, and says " You are well aware that I was in need of expenses this year ; it would have been proper for you to have advanced 10 rupees more by way of assistance ; you might have taken credit in the following year ;" and he threatens *Nundcoomar* with a proceeding in the nature of a distress. This is the language rather of the Owner of the estate than of a Trustee for the Master and absent proprietor.

In like manner, after the death of *Choonee Lal*, *Gunput Lal* writes in the character of proprietor, not in that of Manager for the absent *Gopal Chund*. He considers what repairs should be made ; threatens his Uncle when in arrears, and reproaches him with having ill-used the *Ryots* and dependents. In the Letter, No. 393, he, too, requires produce to be sent



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for the marriage of *Baboo Laljee's* Daughter, with which *Gopal Chund* would seem to have no concern. In the Letter,, No. 395, he writes, "You requested me to write a Letter, to *Patna* that you should deposit the rents of *Kusba Tilhara* there; but I have no desire that money should be deposited there, as a large sum of mine is deposited there; therefore, I request you to send in cash the rent of *Kusba Tilhara* up to *Phagun*, instalment in full and soon."

Again, No. 387, written in 1856, is a remarkable Letter, for it not only gives various directions which imply ownership, but it contains the following passages, which seem to point to the joint interest of the Respondent in this property: "Uncle, I have been laid up with fever, therefore, I have sent *Khedoo Lal's* Brother for inquiry." And again, "Uncle, I have already written to you the full particulars; I have also explained to *Khedoo Lal's* Brother; please give *Khedoo Lal* your good opinion regarding any point he might ask and act accordingly."

Their Lordships can find no trustworthy evidence that either *Choonee Lal* or *Gunput Lal*, whilst thus acting and writing, accounted for the rents of this property to *Gopal Chund* or to *Gopal Chund's* family; and finding the direct evidence on the part of the Respondent thus corroborated, they concur in the conclusion of the Judges of the High Court, viz., that *Kusba Tilhara* was purchased by *Choonee Lal* on his own account, though in the name of his eldest Son.

Their Lordships will next proceed to consider what is the effect of the evidence as to the banking *Kotee* established in 1844, from which a considerable part of the family wealth seems to have been derived



The Appellant, *Gunput Lal*, has contended broadly that in this *Kotee*, *Choonee Lal* had no interest. It is, however, unquestionable that, after the dissolution of the partnership with *Sreekrishen Lal*, the business was carried on in the joint names of *Choonee Lal* and *Gunput Lal*; and the Principal *Sudder Ameen*, though his decree in other respects was averse to the Respondent, gave effect to the ostensible title, and held that *Choonee Lal* had a half-share in this *Kotee*. *Gunput Lal* has represented that, after the establishment of his Brothers in separate Shops, he remained in his Father's original Shop as a *Gomastah* at Rs. 50 *per mensem*. It is very difficult to believe that, by his earnings in this capacity, or by means of any other separate employment, he accumulated money enough to pay, in 1836, Rs. 7,500 for the lease of *Koor kihar*; to pay the price of the 8 *annas* of *Gorabhurat* purchased in his name in 1842; and finally to establish this *Kotee*. It seems to be far more probable that this business, which was originally carried on in partnership with *Sreekrishen Lal*, the partner of *Choonee Lal* in the cloth shop, was, in fact, established and carried on by *Choonee Lal*, though in the name and with the aid of the personal services of his youngest Son. At all events, it lay upon *Gunput Lal*, in whose dominion the Books of this concern were, to show far more clearly than he has done that his Father had either no interest, or only a limited interest, in this concern. And upon the evidence as it stands, their Lordships can find no sufficient grounds for dissenting from the conclusion of the High Court that the banking-house was, at the time of his death, the sole property of *Choonee Lal*.

In their Lordships' opinion the fate of the appeals

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must be determined by the findings upon these two questions—the real ownership of *Kusba Tilhara* and the interest of *Choonee Lal* in the banking *Kotee*. For, whilst the Respondent has broadly contended, that everything which stood in the name of any member of the family belonged to *Choonee Lal*; so the Appellants have as broadly contended, that nothing was *Choonee Lal's* except that which stood in his own name; and that *benamee* transactions were unknown to the family. It is hardly possible upon the evidence to draw a definite line between these two cases. The difficulty of doing so is greatly increased by the finding as to the *Kotee*; since, unless he had the separate interest, which he says he had, in that *Kotee*, it is difficult to see whence *Gunput Lal* derived the funds by means of which many of the purchases in his own name were made. Their Lordships are not insensible to the difficulties of the other side. If the evidence as the Shops carried on in the separate names of *Gopal Chund* and of the Respondent and his Sons had stood alone, their Lordships would have inclined to the opinion, that they were separate property. It is, however, to be observed as to these, that the Respondent admits that the separate Shops opened in his name or in the names of his Sons, and all the investments made out of the profits of these shops from part of the joint family estate; and their Lordships for the reasons above given have found that *Mouzah Tilhara*, the principal and almost the only property alleged to have been purchased by *Gopal Chund* out of the profits of his Shop, was in fact purchased by *Choonee Lal* in the name of his Son. The *Ikrahnamah*, again, though it does not touch directly any of the properties in dispute, affords



a strong inference in favour of the theory of separate interests and separate transactions; and it is difficult to explain why so elaborate a contrivance should have been adopted in order to shift property belonging to the Father from the name of one Son to that of another. The case is one which a native *Punchayet* composed of persons conversant not only with native customs, but with the circumstances of this family, knowing what questions to put to the parties, and what accounts to call for, and capable of understanding such accounts when produced, would probably have been more competent than any Court of Justice in *India* or *England* to try satisfactorily. Their Lordships have, in this case felt much doubt and difficulty in dealing with a record, the value of which is by no means in proportion to its bulk, and with the conflicting judgments of two Indian Courts. But, upon the whole, and for the reasons above stated, they have come to the conclusion, that it is their duty to advise Her Majesty not to disturb the carefully considered judgment of the High Court, so far, at least, as relates to the acquisitions of the family in the lifetime of *Choonee Lal*. As to those which have been made after his death, the eight *annas* of *Backergunj*, purchased in *Gunput Lal's* name, cannot be supposed to have been purchased otherwise than out of the family funds in *Gunput Lal's* hands. There is more difficulty in respect of the lease of *Koorkihar*, which has been renewed in the name of the Appellant, *Mussumat Poonpoon Koonwur*. But their Lordships are of opinion, that she has failed to show, as she might have shown, that this renewal was paid for by her own funds. They believe, on the evidence, that the money came from *Gunput Lal*, and if it came from *Gunput Lal*

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it must be presumed, like the purchase money of *Backergunj*, to have come from the family funds. Therefore, on this point also, their Lordships think the judgment of the High Court should be affirmed.

On the argument of this appeal it was contended for the Appellants, and admitted on behalf of the Respondent, that the Decree of the High Court would in any case require some qualifications. Their Lordships are also of that opinion; but, as at present advised, they are not sure that it will require any alterations except the introduction of a declaration that the separate shops carried on in the separate names of the Respondent, and of his two Sons, and also the landed properties admitted by the Respondent to have been purchased out of the profits of those shops, and to be under his control, are also part of the estate of *Choonee Lal*, deceased; and that in estimating the half-share of the Respondent in that estate, he should give credit for those assets, and any other portion of the estate in his possession or control.

Having regard to the necessary alterations in the Decree, and to the nature of the suit, their Lordships think that each party should bear their own costs of the appeal.

The form of the Decree, as altered, in pursuance of their Lordships' recommendation, will be as follows:—

It is ordered and decreed that the Decree of the Lower Court be and the same is hereby reversed, and the suit of the Plaintiff, *Khedoo Lal*, for a half share of all the property real and personal left by his Father, *Choonee Lal*, deceased, decreed: And it is declared that the estates and landed property standing



in the names of *Gopal Chund* and *Gunput Lal*, or of any other person or persons, *benamee*, or in trust for them or any of them, are the property, of the said *Choonee Lal* deceased, and acquired with his funds: And it is further declared that the lease of *Mouzah Koorkihar* was renewed with the funds, not of *Mussumat Poonpoon Koonwur*, but of the family, which were then entrusted to the Defendant, the said *Choonee Lal*: And it is further declared that the banking house, as well as the House property claimed, were the sole property of the said *Choonee Lal* deceased: And it is further declared, that the Shops carried on in the separate names of the said Plaintiff *Khedoo Lal*, and of each of his two Sons, and *Mouzahs Budun*, and *Hurchundpore* and *Rughoonathpore*, and *Jheketea*, in *Kotumba* and the two Houses and Coach-house in Street No. 4 of *Sahebgunj*, which are all mentioned in the written statement of the Plaintiff, *Khedoo Lal*, and any other property standing in the names of the Plaintiff and of his two Sons, or any of them or of any other person or persons *benamee*, or in trust for them or any of them, were also the property of *Choonee Lal*, and part of his estate: And it is further declared that the Plaintiff is entitled to a half share of the estate of his Father *Choonee Lal* deceased; but that in estimating such half-share the Plaintiff is to be charged with the value of such of the above-mentioned properties as are in the possession or control of him or of his said Sons or any of them, and with the mesne profits thereof: And it is further declared, that the said Plaintiff is entitled to recover Rs. 17,575. 13a., being a moiety of the sum of Rs. 35,151. 10a., being part of such estate, and fixed by the Lower Court as the

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mesne profits of the said Banking house : And it is further declared, that the said Plaintiff is also entitled to a half-share of all mesne profits obtained from the landed property left by the said *Choonee Lal* deceased since the date of his demise. And it is further declared, that the Defendant, *Mussumat Mankee Koonwur*, the Wife of *Gopal Chund*, one of the Sons of the said *Choonee Lal* deceased, who is said to be missing, is entitled to maintenance out of the said estate, which will be awarded by the Lower Court in execution, if required : And it is further ordered and decreed, that the said Defendant, *Mussumat Anundee Koonwur*, as the Widow and heiress, according to Hindoo law, of the said Defendant, *Gunput Lal* (now deceased), from and out of the estate and effects, if any, which may have come into her hands or into her possession to pay the said Plaintiff the sum of Rs. 3,012, being the amount of costs incurred by him in the High Court of *Bengal*, with interest thereon at the rate of twelve *per cent. per annum* from the date of the Decree of the said High Court to the date of realization thereof : And it is further ordered and decreed, that the said Defendant, *Mussumat Anundee Koonwur*, as such Widow and heiress in like manner, and from and out of the same estate and effects, do pay to the said Plaintiff the costs incurred by him in the Lower Court, with interest thereon at the rate aforesaid, from the date of the Decree of the said Lower Court to the time of realization.

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MUSSUMAT AMEEROONNISSA KHANUM }  
and MUSSUMAT PARBUTTY ... } *Appellants ;*

AND

MUSSUMAT ASHRUFOONNISSA ... *Respondent.\**

*On appeal from the High Court of Judicature at Fort William, in Bengal.*

THIS suit was instituted by the Appellants, *Mussumat Ameeroonnissa Khanum*, as Guardian of one *Sha Baker Reza*, and *Mussumat Parbutty*, to recover possession of *Talook, Nisf Ambey* in *Pergunnah Bhaugulpore* with mesne profits, and the only question raised on the issues was, whether *Velayet Hossein*, the Purchaser at a sale for arrears of Government revenue of the above *Talook*, under whom the Respondent derived title to the *Talook*, had brought it with his own money or with trust funds belonging to one *Belkissoonnissa Begum*, who was the *Shajada*

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*B*, a Mahomedan married woman, but separated from her Husband, contracted an irregular marriage with *V*, and cohabited with him for many years, until her death. *V*, during the time he so cohabited with *B*, purchased an estate, which was registered in his name as the Owner.


Present :—Members of the *Judicial committee* :—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

Eleven years after the date of the Purchase, *B* and *V* being then both deceased, a suit was brought by the then *Shajada Nusheen* to recover the estate brought by *V*, on the ground, that it was purchased by him *benamee* with moneys which belonged to the *Shajada Nusheen* or lay Owner of an *Imambarah*, or a superintendent of a Mahomedan religious establishment, which he assumed to be. Held, upon the evidence (1) that it was not a *benamee* transaction, as the purchase-money was partly *V*'s, and partly obtained by gifts from *B* to *V*; and (2) that it was not from the proceeds of a misappropriation by her as Trustee of the *Imambarah*, as she was lay proprietor, and had power of disposition, and, therefore, that the doctrine of resulting trusts did not apply.



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*Nusheen* (a) from whom the Appellants derived title, and which they alleged belonged to the *Imambarah* at *Karagolah*, of whom the infant, *Sha Baker Reza* was the then *Shajada Nusheen*. The case made by the Appellants in the plaint was, that the *Talook* was purchased by *Velayet Hossein*, while *de facto* acting as *Shajada Nusheen*, from the income of the *Imambarah*, which, on the death of *Belkissoonnissa Begum*, devolved on her Husband, and from him to the Appellants.

The Principal *Sudder Ameen* of *Bhaugulpore* (*Moulvie Syud Mahommed Wuhudesden*), gave judgment on the 6th of *August*, 1862, and stated his opinion to be, that *Velayet Hossein* could not himself have had the money for the purchase of the *Talook*, as it appeared that he never had sufficient means for that purpose, but that it was not improbable that *Belkissoonnissa Begum*, with whom he cohabited, might have, out of her means and her bounty towards him, supplied him with the money to purchase for himself.

On appeal to the High Court, a division Bench, consisting of the Justices *Steer* and *Jackson*, gave judgment on the 3rd of *October*, 1863. The Judges differed from the Principal *Sudder Ameen* upon his finding on the facts, but affirmed his decree. The material part of the judgment of the Court was as follows :—"The case, which upon the testimony of ther better Witnesses, the Plaintiffs seek to establish is this ; that *Velayet Hossein* married (irregularly indeed) the Lady *Belkissoonnissa Begum*, and became,

(a) A person who has a right of superintending a religious establishment ; literally, he who sits on the carpet used for prayer. See *Baillie's Dig. Muh. Law*, 598, note.



*ipso facto*, *Shajada Nusheen* of the *Imambarah*; that, as such, he instructed his *Mooktar* to bid for the *Talook*; that, on his being declared the Purchaser, *Belkissoonnissa Begum's Dewan* hurried up from *Karagola* to deposit the earnest money and afterwards to pay the balance of the purchase-money; that this was done wholly from the sale of gold mohurs, Sicca rupees, and gold and silver articles, and that the *Dewan* paid it in himself; that *Velayet Hossein* was all this time at *Karagolah*; that the certificate of sale was made out in his name; that *Belkissoonnissa Begum*, on hearing of this, expressed her displeasure; that, however, she was formally invested with the *teeka* as proprietor, but that nevertheless she never exercised any of the rights of proprietorship, but *Velayet Hossein* continued in possession and after the lifetime of *Belkissoonnissa Begum* till he died. Also, that *Velayet Hossien* had been a needy person, merely raised into a position of comfort by his connection with *Belkissoonnissa Begum*, and not possessed of any resources out of which he could have made this purchase." And the Court proceeded to show what, in their opinion, were the circumstances of improbability which forbade their accepting this version of the affair. "We think," the Court observed, "it needless to inquire into the exact resources possessed by *Velayet Hossein* at the time he made purchase, and still less necessary to record any surmises as to the precise manner in which the purchase was arranged. We think there is no evidence to show, that *Velayet Hossien* had *Belkissoonnissa Begum's* instructions to buy this *Talook* for her, and had no evidence on which he would be safe to rely showing that *Velayet Hossein* had used money belonging to that Lady in the purchase. And as the agency ought to be quite clear, on the trust

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money distinctly traced, we should not be justified, under the circumstances of this case, in taking the *Talook* out of the Defendant's hands to put it into those of the Plaintiff. Consequently, we affirm the judgment of the Court below, dismissing the Plaintiff's suit with costs of the appeal and interest thereon. We have been obliged to go into the evidence more fully than is usual in the case of a judgment affirmed upon the merits entirely, because it did not appear, that the Judge in the Lower Court had exercised his mind upon that evidence, and we cannot help observing how little in accordance with the precise law of procedure, or with sound principles of judicial practice, this suit has been directed below."

The appeal was from this Decree.

Sir *R. Palmer*, Q.C., Mr. *Leith*, and Mr. *Doyne*,  
for the Appellants, and,

Mr. *Forsyth*, Q.C., and Mr. *J. D. Bell*, for the  
Respondent.

On the question, whether the purchase was a *benamee* transaction, and the purchase-money derived from the trust moneys of the *Imambarah*, while the Purchaser lived with the *Shajada Nusheen*, it was insisted, by the Appellants, that the purchase-money was from the trust funds and that there was a resulting trust, as *Velayet Hossein* was *de facto* *Shajada Nusheen*. The cases of *Gopeekrist Gosain v. Gungapersaud Gosain* (a), *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (b), *Faez Buksh Chowdry v. Fukeeroodeen Mahomed Ahassun Chowdry* (c), upon the doctrine of *benamee* purchases, were referred to.

(a) 6 Moore's Ind. App. Cases, 53, 74.

(b) 11 Moore's Ind. App. Cases, 28.

(c) *Ante*, p 234.



Judgment was delivered by

Sir MONTAGUE SMITH:—

This is an appeal from a judgment and Decree of a division Bench of the High Court of Calcutta which affirmed the Decree of the Principal *Sudder Ameen* of *Bhaugulpore*, dismissing the suit of the Appellants. The suit was brought to recover possession of the *Talook, Nisf Ambey*, which had been purchased by *Velayet Hossein* in his own name as long ago as the year 1848. The suit was not commenced till the 16th of *February*, 1859, nearly eleven years after the purchase.

The suit is brought upon the alleged ground, that the moneys with which the purchase was made were not the moneys of *Velayet Hossein* himself, but of a Lady named *Belkissoonnissa Begum*, with whom he was living as her Husband. It was admitted by Sir *Roundell Palmer*, that it was not a *benamee* transaction; that *Belkissoonnissa Begum* had not desired that the estate should be bought in her name, and that there was no intention on her part to purchase an estate for herself; but Sir *Roundell Palmer* put the case on the ground that the money, although it was her money, belonged in fact to an *Imambarah*, of which she was the Owner, as a sort of lay Owner, and that there was a resulting trust in favour of the *Begum*, in consequence of the money with which the estate was purchased having been so provided.

Now, it is plain, that if the money did not come from the source indicated, or if the purchase was made in the name of *Velayet Hossein*, with the consent of *Belkissoonnissa Begum* that it should be so purchased for him, there is then no resulting trust. The very principle of a resulting trust is, that the property has been purchased with money belonging

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to another, with an implied trust that it should belong to that other person to whom the money also belonged. But if it was the intention of the person to whom the money belonged that there should be no such trust, then, of course, no such implied trust could arise, because it is only a trust by implication, and the presumption would then be met by the facts.

The facts of the case are extremely simple. It seems that *Belkissoonnissa Begum* was a Lady of good family and considerable fortune and that one of the properties which she had was the *Imambarah*. She was, when young, betrothed to her Cousin, *Sha Ali Reza*, but it seems, either that she never cohabited with him, or that at all events she lived in his House but for a short time, and then they separated. The cause of the separation appears to have been, that *Sha Ali Reza* refused to pay her dower, and the Mother of *Belkissoonnissa Begum* then withdrew her from his House. That being her position, in the year 1842 she formed relations with *Velayet Hossein*, and it appears that she lived with him as her Husband until her death in *January*, 1849. It is plain, that during the period of seven years which elapsed whilst they were so living together, *Velayet Hossein*, although he might not have been possessed of property at the time when these relations commenced, had probably during that period gifts from her, or he may have been allowed to receive the income of her property and to appropriate a part of it to his own use. It appears that in the year 1848 the Lady was in falling health, and in that year this purchase was made. It appears to have been a purchase made at a revenue sale, and the purchase was made in the name of *Velayet Hossein*. All the instruments of title were made out in his name, and he was



registered as the Owner of the estate. This happened ten months before the death of the *Begum*.

Now, an instrument has been put in and relied on by both sides, a *Mookternamah*, dated the 15th of April, 1848, in which *Velayet Hossein* appoints four persons as his *Mooktars* to purchase and pay for this estate, and one of those persons is *Mudun Gopal*, who was the *Dewan* of the *Begum*, with whom he was living.

It is said, that there is evidence that the earnest money and the consideration money were provided by the proceeds of jewels and other valuables which belonged to the *Imambarah*, and their Lordships cannot fail to see that the case, as originally put, was, that *Velayet Hossein* was the *Shajada* of the *Imambarah*, and that he had used the money which he held as *Shajada* in trust for the *Imambarah*, to make this purchase. The first two issues were framed to raise those questions, but the Principal *Sudder Ameen* has found, and he seems in that to have been well grounded upon the evidence, that there was no existing *Imambarah* in the sense of any place of worship which might be said to have its property belonging to it, as distinct from the ownership of the *Begum*; that it was a sort of lay *Imambarah*, and that, although he may have called himself *Shajada*, as he does in this document, it really was more a title of honour which he had assumed, or a nominal appointment of *Shajada*, than any real *status* which he had or anything which put him in the position of a Trustee for an *Imambarah* as distinguished from any property which his wife had. The property of the *Imambarah* belonged to the *Begum*, as her other property would do, and, as was admitted by the learned Counsel for the Appellant, she might have disposed of it as she thought fit.

Now, first of all, did the High Court come to a

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wrong conclusion in saying, that it was not proved to their satisfaction that the money which paid for this estate was the proceeds of the property of the *Belkissoonnissa Begum*? There is a good deal in the evidence to show that the jewels belonging to the *Belkissoonnissa Begum* were brought to Bankers and others and sold, but a great deal of that evidence is hearsay, and the Court seems to have come to this conclusion, and they say, "Although there is some evidence which if entirely believed would establish that the money did come from that source, yet, taking all the circumstances of the case into consideration, we cannot act upon it; we cannot say with sufficient certainty that evidence is true." One circumstance upon which they strongly rely is, that this suit was brought after the deaths of all the parties who knew the transaction and who could have explained it. *Belkissoonnissa Begum* was dead; *Velayet Hossein* was dead; the *Dewan* was dead. Those three persons knew exactly what the transaction was; and, certainly, when the suit is brought to set aside a purchase which was made eleven years before, which has remained unimpeached from the time when it was made until the institution of the suit, every Court would be bound to look with very great jealousy at the evidence which is brought forward in order to support such a case.

But assuming that the High Court are not well founded in the conclusion to which they came, that no part of the money was proved to have come from the proceeds of the sale of the jewels belonging to the *Belkissoonnissa Begum*, still their Lordships think, that there was evidence to support the conclusion of fact to which the Principal *Sudder Ameen* arrived, and therefore, that it is unnecessary to decide the question which the High Court took upon themselves to deter-



mine. What the Principal *Sudder Ameen* thought of the case was this, that some of the money might have come from the *Belkissoonnissa Begum*, but he said, in effect, "Assume that it did so come; there is to my mind very strong evidence from the facts of the case, that that was a gift on the part of the *Belkissoonnissa Begum*, and that she intended to do something for the benefit of the man who had been living with her for seven years." Her Husband, *Sha Ali Reza*, had in fact been the cause of her separation from him by his refusal to pay her dower. She had formed relations with *Velayet Hossein* as a second Husband, although it was not a marriage which was warranted by law; still he lived with her as her Husband, and apparently upon very good terms. It was, therefore, very natural, if she found that she was in bad health, that she should have been desirous to make some provision for his benefit. It is also, their Lordships think, extremely probable that he had money of his own, for several of the Witnesses speak to his having had money of his own at various periods after his marriage, though he may not have been a man in good circumstances before. The evidence upon which the conclusion is founded, that she gave him some of the money, and that he bought this estate in his own name with her consent, is found in her acquiescence during her lifetime, and their Lordships also think it is found in the acquiescence of *Sha Ali Reza* after her death. *Sha Ali Reza* was certainly not sleeping upon his rights. He was living near these parties. He instituted a suit to set aside a Deed of gift which was set up by *Velayet Hossein*, but he took no steps during his lifetime to impeach the purchase; there is the strongest inference to be drawn from his acquiescence in it. What could have been

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the ground of his acquiescence? The ground of his acquiescence must have been, that he knew that the purchase which was made by *Velayet Hossein* was not made for his Wife, but was made, with her consent for *Velayet Hossein* himself. One Witness for the Appellant, named *Enayet Hossein*, gives evidence which fortifies the view taken by the Principal *Sudder Ameen*. He says of *Velayet Hossein*, "he had not means formerly, but when he got married at *Karagolah* he became rich," and then he says, "the possession of *Sha Walayet Hossein* since his purchase continued without opposition, and after the sale the *Bebee* of the *Sha* died at *Bhaugulpore*. I cannot say after how long she died. She used to live with her Husband and she did not claim the *Talook*." There is thus strong evidence of her acquiescence, as well as of all the persons most interested in the transaction. The purchase was made by her own Agent, who was appointed for that purpose by *Velayet Hossein*, and she appears to have been perfectly satisfied afterwards. It seems, also, to their Lordships that the whole history of the parties, and the probabilities of the case strongly confirm the view originally taken by the Principal *Sudder Ameen*.

It was contended that this view of the case was not raised by the issues.

Their Lordships would be disposed to decide the appeal upon the substantial merits, unless they had reason to suppose the parties had been misled by the form of the proceedings; and although it may be true that the above view is not expressly stated, they think it in effect involved in the first two issues, which were founded on the hypothesis of the misappropriation of the property of the *Imambarah* by *Velayet Hossein*, as *Shajada*, and



the same view is open upon the general question raised in the third issue.

On these grounds, therefore, their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court of Judicature, and to dismiss this appeal with costs.

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*Appellant;*

AND

KRIPA MOYEE DEBEA ...

*Respondent.\**

*On appeal from the High Court of Judicature  
 at Fort William, in Bengal.*

THIS suit was brought by the Appellant against the Respondent, and others, claiming as the nearest male heir of his late maternal Uncle, *Mundolall Surma Roy*, who died childless, leaving the Defendant, *Pran Monee Debea*, his widow, who by her answer, waived all right and title as nearest heir to his estate in favour

Present:—Members of the *Judicial Committee*: The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor:—The Right Hon. Sir Lawrence Peel.

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A loan transaction in 1837 was effected by two Deeds—first, a *Kabala*, an absolute Deed of sale, and secondly, an *Ikrarnamah*, or Deed of agreement, constituting a mortgage.

The *Ikrarnamah* provided, that if the Mortgagor paid, within ten years, a lump sum at the rate of 12 *per cent.* interest, he was to recover back the estate and the balance of collections, less charges. The Mortgagee entered into possession. No interest on the principal sum was paid at the time stipulated, and in 1859, a redemption suit was brought by the Mortgagor's heir and for possession. Held, (1) that the *Ikrarnamah* did not take the case out of an ordinary mortgage transaction; (2) that *Ben. Reg. XV. of 1793* did not apply, and an account directed to be taken of what had been received by the Mortgagee, upon the footing, that the interest which accrued, from time to time, was to be set off against the rents and profits received, and the Mortgagee only to account to the Mortgagor for the rents, profits, and interest which he might have received, over and above the interest then due to him on the mortgage.

*Semble*: Sect. 6 of that Regulation is repealed by sect. 7, Act, No. XXVIII. of 1855.



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of the Appellant; to redeem and recover possession of certain immovable property mortgaged for a term of ten years by *Mundolall Surma Roy* to *Kalee Prosad Roy* (since deceased), under two contemporaneous Deeds, called a *Kabala*, or *Bynamah* Deed of sale, and an *Ikrarnamah* or Deed of agreement; alleging that the profits from the rents of the property with interest thereon, calculated at the rate of 12 *annas per cent.* (or 9 *per cent.*) *per annum*, had accumulated in the hands of the Respondent, and that the aggregate amount thereof then exceeded the amount of the mortgage loan, viz., Rs. 11,000, together with interest thereon calculated at the higher rate, Rs. 12 *per cent. per annum*, which remained due and owing; and praying that the aggregate amount of the last-mentioned principal sum and interest might be deducted from the aggregate amount of the accumulated profits and interest, and that the balance which was alleged to be the sum of Rs. 30,323, should be paid to the Appellant.

The Respondent by her answer submitted, first, that the profits of the mortgaged estate were less than the interest payable; secondly, that, in the circumstances, the law did not apply to the case of Mortgagee in possession of mortgaged lands, or limit the receipt of interest out of the collections to an amount equal to the principal; and thirdly, that the collections had not exceeded the principal, but were much less.

The material question involved was, whether the ordinary rule in taking accounts between Mortgagor and Mortgagee prevailed and applied in the present case, as held by the High Court; or



whether an express stipulation, agreed to by the parties by the *Ikrarnamah*, should be given effect to and enforced, as decreed by the Principal *Sudder Ameen* in his judgment.

The *Ikrarnamah*, after providing that the rent of the property mentioned in the *Bynamah* "will remain in the trust of the Purchaser," stipulated amongst other things as follows :—

" Sixth paragraph. After sending the rents of the *Mehals* inserted in the said *Bynamah* into the Collectorate, and after the deduction of salary, expenses, consummation, &c., of the entire year, whatever profits will be left when I (the Vendor) will liquidate the principal and interest, then I (the Vendor) will receive the money which is deposited, with interest at 12 annas per cent.

" Seventh paragraph. I have sold the *Mehals* for Rs. 11,000 into the hands of the Purchaser for a term of ten years ; after the expiry of the term when I (the Vendor) will pay up in one lump sum the principal, with interest, at 1 per cent., then I will take back the *Mehals* inserted in the said *Bynamah*.

" Tenth paragraph. For the purpose of realizing the rents of the *Mehals* inserted in the *Bynamah*, a *Mohurrir* will be employed, and the said *Mohurrir* shall yearly adjust the *jumma kurch* accounts to me (the Vendor) and I (the Vendor) shall write my acknowledgment on the aforesaid *jumma kurch* ; the Purchaser shall have nothing to do with the balance of rents, it will be in my hands."

By the judgment of Mr. *James Reily*, the Principal *Sudder Ameen*, it was declared, with reference to the last-mentioned stipulation in the *Ikrarnamah* and *Bynamah*, as follows :—" I have only to determine now how the interest shall be calculated. The Plain-

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tiff asks for a sum equal to the principal that may have accumulated. The principal Defendant contends, that the collection was not enough to pay the interest of the loan, and that they are entitled to interest on the loan for the entire period of twenty-nine years. *Macpherson*, in his Book on Mortgages, basing his opinion on the precedents of the *Sudder* Court, states 'that in taking these accounts interest is as a general rule allowed on the payments of both parties ; but there are two modes, in either of which the accounts may be made up. They may be permitted to run on from the date of the loan to the date of the settlement, interest being allowed to the one party on the whole sum lent, and to the other in the sums realized over and above the interest to which the Mortgagee is entitled from the date of realization, or the amount collected by the Mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and then being allowed from year to year only reduced interest on the reduced principal.' Mr. *Macpherson* adds that 'any agreement made by the parties as to the manner of accounting will be enforced, if not in itself illegal.' Referring to the contract between the parties I find it stipulated that 'after paying the Government revenue, and deducting the expenses, the Seller shall return the purchase-money, with interest ; then the Seller shall receive whatever may have gathered as accumulated of the profits, with interest, at the rate of 12 *annas per cent.* The account, therefore, should be drawn up in accordance with the conditions adopted by the parties ; that is, to give the Plaintiff interest on his profits for the entire period, and to give the Defendant interest for the entire period ; but the Court is



precluded by Law—sect. 6 *Ben. Reg. XV.* of 1793 (*a*)—from awarding, in any case whatever, a greater sum for interest than the amount of the principal. Holding, therefore, to the original stipulation made between the parties, except in so far as it may contravene the Law, the amount will be as follows.” The judgment then stated the figures at length, showing a balance of Rs. 23,613. 8a. 4gds. to be due to the Appellant, and which sum was, accordingly, decreed to be paid to him by the Respondent.

From this Decree the Respondent appealed to the High Court consisting of Messrs. *H. V. Bayley* and *A. A. Roberts*, which Court, on the 6th of *October*, 1863, delivered judgment as follows :—  
“ The question to decide is, whether the transaction was a mortgage to which the law and rulings of this Court, as to accounting in cases of mortgage, can apply? If this be a mortgage, then the argument of the Defendant, the Appellant, arising from the contention that it is a loan and deposit only, and that repayment by deposit in money is a condition precedent to any right accruing to the Plaintiff, must fall, and, whether the calculation of interest due and payment must be made in the manner laid down by

(*a*) Sect. 6 of *Ben. Reg. XV.* of 1793, is as follows :—“ If the interest on any debt, calculating according to the rates allowed by this Regulation, shall have accumulated so as to exceed the principal, the Courts are not in any case whatever (excepting the cases specified in section 12), to decree a greater amount for interest than the amount of such principal.”

The suit in this case was brought in 1859, and sect. 6 of *Ben. Reg. XV.* of 1793, seems repealed by the 7th sect. of the Act, No. XXVIII. of 1855, which enacts that “ Nothing hereinbefore contained shall prejudice or affect the rights or remedies of any person, in respect of any act done, or contract entered into, previously to the passing of the Act.”

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this Court for cases of mortgage. We think the following passage from *Macpherson*, Law of Mortgage [3rd ed.], indicates a fair test and guide to the answering the question, whether the transaction was a mortgage or not :—'So long as the nature of a transaction is naturally such as to stamp it as belonging to a particular class of mortgages, the same, calling it by a different name, will not transfer it to another class. In one case, where there was an absolute sale, but the Purchaser gave an *Ikrar-namah*, with condition that if the Vendor repaid the purchase-money, and interest, by a fixed day, the Purchaser would re-convey the estate to him ; it was contended, that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages. But the Court held 'redeemable sales' and 'mortgages by conditional sales were in their nature identical, and merely different modes of expressing the same things, and that, therefore, a redeemable sale could be foreclosed only in the same manner as a mortgage or conditional sale would be. Applying this rule to the facts of this case, we have here, the Plaintiff borrowing from the Defendants Rs. 11,000, and making an absolute Deed of sale, varied by another *Ikrar* (which is the most common practice in this Country for providing an equity of redemption), and making the transaction unmistakably nothing but a redeemable sale, identical with a mortgage. Although there is the expression, that the Rs. 11,000 be repaid, by a deposit of the amount, with interest, and the profits are to accumulate at interest, until the loan be repaid, and then refunded to the Borrowers, we look upon this as nothing that can alter the essential and substantial character of the transaction—that of a



redeemable sale. Thus, under the facts of this case, and the rule above cited, which in our view is applicable to these facts, this transaction is of the character of a mortgage, and not, as urged by the Defendant, in his appeal, a loan to be repaid by deposit of cash, and in no way of the character of a mortgage. The case must, therefore, be governed on this point, as also in regard to the principle of accounting and crediting payments first to interest, by the law and rulings of this Court, on these points. That law, and those rulings, are so clearly laid down in pages 248 to 254 of the 3rd edition of *Macpherson's Law of Mortgages*; and in respect to the calculation of interest in pp. 243-4, that we need only refer the Principal *Sudder Ameen* to those passages, and desire him to re-adjust the account according to those rules. The realization should be first credited to interest, and then the account made up as laid down in the above-cited rules. In this account, the Defendant is to have credit by deductions, on account of *Mohendropore*, as found, to be set apart for the maintenance of both Widows. Should the Principal *Sudder Ameen* think it necessary, upon this remand, to provide a local inquiry, in order to ascertain what the Defendant may have realized, it will be open to him to do so. Costs to follow the eventual result of suit."

The appeal was from this Decree.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellant, and

Mr. *Doyne*, for the Respondent.

The arguments turned entirely upon the construc-

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tion of the stipulations contained in the sixth and tenth articles of the *Ikrarnamah*. Ben. Reg. XV. of 1793, sect. 6, Act, No. XXVIII. of 1855, sect. 7, and *Macpherson's* Law of Mortgages, pp. 243, 248, 244 [3rd ed.], referred to in the judgment of the High Court, were cited.

Their Lordships' judgment was delivered by

The Right Hon. Sir ROBERT COLLIER :—

In this case the question admits of being very shortly stated. It is this, whether the ordinary rules applicable to mortgages expressed in the passages in Mr. *Macpherson's* Book on the Law of Mortgages, referred to by the High Court, do or do not apply to the present case? It was contended, that they did not apply to the present case because their application is expressly excluded by an Agreement between the parties; and if their Lordships had come to this conclusion they would, undoubtedly, have given effect to terms of that Agreement.

The construction of the Agreement which is contended for on the part of the Appellant is this, that the Mortgagee on his part is entitled to the payment of the principal and of the interest on the debt, but that the payment of interest which properly would accrue, at all events annually, carry no interest itself, which no doubt is the ordinary rule. On the other hand it is said, that the Mortgagor is entitled to call the Mortgagee to account for the whole of the annual proceeds of the property, less the expenses of collection, and that each of the annual payments of the proceeds of the property is chargeable with interest; so that while on the one hand the Mortgagor can charge the Mortgagee with all the annual proceeds



of the estate, those annual proceeds carrying interest, the Mortgagee on the other hand can only charge the Mortgagor with the debt and the interest, the latter not carrying interest, the result of which is certainly somewhat extraordinary—that, whereas in this case, it appears very clear, that the mortgaged property was an insufficient security, and that the proceeds of it fall short by some Rs. 400 a year of the interest on the principal sum, yet, nevertheless, after a long period of time, the Mortgagor, not having paid a farthing of the principal or interest, is entitled to a large balance from the Mortgagee. Of course the parties might have so agreed, if they pleased, but their Lordships would be loth to put such a construction upon the Agreement unless they were compelled to do so by very plain words.

On looking at this Agreement, more especially at the 6th and 10th paragraphs, which have been referred to, and to the precise terms of which it is not necessary to refer again, their Lordships, on the whole, think, that these paragraphs and the Agreement generally, which is drawn by no means in clear terms, are not inconsistent with supposition, that the parties intended that the interest might be set off, from time to time, against the rents and profits, and that the Mortgagee was only to account to the Mortgagor for any rents and profits and interest on the same which he may have received over and above the interest due to him upon the debt.

Their Lordships being of opinion, that that interpretation is not inconsistent with the contract, according to the best construction they can give to it, it follows, that the rule stated by *Macpherson* on mortgages is not excluded by the terms of this Agreement.

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Their Lordships think it right also to add that, even assuming the construction which has been contended for on the part of the Appellant, certainly an unusual one in Agreements of this kind, their Lordships are not prepared to say, that the High Court was wrong in determining that such a construction was applicable only to the first ten years, and that if the Mortgagor chose at the expiration of that period to avail himself of the Regulation which permit the redemption of mortgages after the expiration of the term stipulated for, he must come in under the general terms of those Regulations which prescribe the equitable conditions required to be satisfied.

Their Lordships are also of opinion, that Regulation XV. of 1793, sect. 7. does not apply to transactions of his kind.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decision of the Court below ought to be affirmed, and this appeal dismissed with costs.

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RAM GOPAL ROY, and others ... *Appellants* ;

AND

GORDON STUART & Co., Secre-  
taries to the Bengal Coal  
Company, PERSHAN CHUN-  
DER CHATTERJEE, and others } *Respondents.\**

*On appeal from the High Court of Judicature at  
Fort William, in Bengal.*

THE questions raised in this appeal were first, one respecting boundaries, involving a claim by the Appellants to 4,975 *beegahs* of land as part of *Mouzah Gopalpore*, but resisted by the principal Respondents, as being part of and within their village

Present :—Members of the *Judicial Committee* :—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith and the Right Hon. Sir Robert Porrett Collier.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

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With re-  
spect to the  
admissibility  
of copies of  
Grants or  
Deeds in evi-  
dence, the  
practice in  
the *Mofussil*  
Courts differs  
from the pro-

cedure in England, and is not governed by the strict rules which there prevail, when the question is, whether a copy ought to be submitted to the jury; but it is the duty of the Judge before admitting a copy of an original document as evidence, to consider what weight and value should be given to it, and to test its authenticity by satisfying himself that the grounds for not producing the original are well founded so as to let in the copy as secondary evidence.

A copy of a copy of an original *Sunnud*, registered, and proved in another suit, admitted as evidence.

It is the rule of the *Judicial Committee* in questions of boundaries, which depend upon local investigation and local inquiries, not to interfere with the findings of the Courts below, unless they are clearly satisfied that there has been some plain miscarriage in the conduct of the inquiry and the decisions of the Courts.



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of *Gopeenathpore*, and secondly, the practice, in a question of title relating to land, of the *Mofussil* Courts admitting copies of a Grant or Deed as evidence of the original.

The Respondents claimed possession of about 5,600 *beegahs* of jungle land, as falling within the boundaries of their village of *Gopeenathpore*. Of the entire area in dispute the Revenue Authorities had, by a survey Award, given possession to Government of 4,975 *beegahs* and 625 *beegahs* to the Appellants, as proprietors of *Mouzah Gopalpore*. The suit was brought to set that Award aside. The Judge of *Bheerbhoom*, Mr. *O. W. Malet*, was of opinion, that the Plaintiffs had failed to prove their alleged boundaries, and that they were also barred by the Act of limitation of suits, and dismissed the suit as against both the Government and the Appellants. On appeal to a division Bench of the High Court, consisting of the Justices *Steer* and *Levinge*, that Court held, that limitation did not apply to the case, and that the Appellants had proved their boundaries to include the land in dispute, and reversed the Decree of the Court below, decreeing to the Respondents the whole area sued for both as against the Government and the Appellants.

The appeal was from this Decree. The Respondents, *Gordon Stuart & Co.*, alone appeared as Respondents in support of the Decree of the High Court.

Mr. *Leith*, for the Appellants,

Argued two points :—

First, on the question of fact, in respect to the boundaries, whether the 4,975 *beegahs* in dispute,



formed part of Appellants' *Mouzah, Gopalpore*, under which they claimed title under a *Sunnud* from a former *Rajah* of *Burdwan*, or of the tenants of the *Mouzah Gopeenathpore*, and,

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Secondly, he contended that, as the suit being founded upon an original *Sunnud*, dated 1195 B. E., which purported to have been made by the then *Rajah* of *Burdwan*, and the same having been challenged as spurious by the Appellants in their answer, the Respondents were bound to produce and prove the *Sunnud*, or give satisfactory evidence of the loss of the same, so as to entitle them to put in as evidence a copy of the *Sunnud*, citing on this point *Syud Abbas Ali Khan v. Yadeem Ramy Reddy* (a). He further contended, that the copy of a copy of the original *Sunnud*, in the absence of evidence of showing the loss, and that it was a true copy, could not be received as secondary evidence; and further, that the Appellants were not parties to a former suit in which the copy had been admitted by the Court, and that the judgment in that case did not operate as *res judicata*.

Sir *R. Palmer*, Q.C., and Mr. *Doyne*, for the Respondents, were not called on.

Their Lordships' judgment was delivered by

The Right Hon. Sir JAMES COLVILE :—

The property in question in this suit is a large tract of jungle land lying to the north of the Great Trunk Road in *Zillah Bheerbhoom*. There have been several Claimants to portions of this land, besides the present Appellants and the Respondents, and some of them were originally parties to this

(a) 3 Moore's Ind. App. Cases, 156.



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suit. Therefore, in order to see how the Appellants and Respondents stand to each other, it may be desirable shortly to consider the proceedings which led to the suit.

There was a dispute as early as the year 1828 between the *Chatterjees* family, whose title is now vested in the principal Respondents, the *Bengal Coal Company*, and one *Ram Narain Mitter*, through whom the Appellants derive their title, concerning the right to this land, but at the time the dispute appears to have been limited to some 1,600 *beegahs* of land. The Government authorities attached this land, and their possession seems afterwards to have extended itself, in some way or another, to the whole of that which was claimed in this suit, 5,600 *beegahs*. When the Trunk Road was made in the year 1841 there was another dispute between the parties as to who were entitled to compensation for the small portion of jungle which was taken on each side of the Road, and, so far as any recognition of title went, the Appellants seem to have been preferred on that occasion. They received some small sum which was awarded for compensation under an *Ikrar*, binding them, in case the opposite party, or any other party should prove a title to it and come against the Government for it, to repay it.

Then came the proceedings which immediately led to this litigation, proceedings which were connected with the Government survey in 1857. There was then the ordinary dispute between the *Chatterjees*, or the *Bengal Coal Company* as then representing the *Chatterjees*, on the one side, and the *Roys*, the Appellants, on the other, and the several other parties who claimed parts of the Forest as annexed to their undis-



puted *Mouzahs*, and also the Government claiming to hold, by some title or another, or by virtue of that occupation which had begun in 1828, a large portion of the land. Mr. Deputy Collector *Ross* appears to have gone upon the land, and to have made local inquiries, and on the 18th of *June*, 1857, he made an Award giving the land, or the greater portion of the land, to the *Bengal* Coal Company as representing the *Chatterjees*. The opposite party appealed to the Collector, who, acting upon his view that the principal document produced by the *Chatterjees* or the *Bengal* Coal Company, was spurious, and that it did not correspond with an earlier document which was admitted to be the foundation of the *Chatterjees'* title, set aside that decision of Mr. *Ross*. There was an appeal from his decision to the Commissioner, and an appeal from the Commissioner to the *Sudder* Board of Revenue, but the result was, that those authorities upheld the Collector's Order. Another Deputy Collector was directed to make a further apportionment and Award of the land among the parties, and the result was that this last Officer, on the 16th of *July*, 1858, awarded 625 *beegahs* of the waste land in dispute to the Appellants, and the remaining 4,975 *beegahs* to the Government.

The result of these revenue proceedings was to put the parties to whom those lands were awarded actually, or constructively, in possession, but also to leave to the opposite party the power of impeaching the revenue Award, and of recovering possession of the lands by a regular suit, if instituted within three years of the date of the Award, and accordingly this suit was so brought for that purpose.

The Government appear to have now dropped out

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of the litigation. The *Zillah* Judge, who was the Judge of first instance, dismissed the Respondents' suit wholly on the ground, that they had failed to prove their title, and he also held, that the suit as against the Government would have been barred by the Act of Limitation, inasmuch as they had been in possession of this land since the time they took possession of it in the year 1828 ; certainly for more than twelve years. There was an appeal from the decision to the High Court, and on that occasion, it seems to have been almost admitted before the High Court, that the Government had not really any title to the land. The High Court, moreover, held that the decision as to the Act of Limitation was erroneous, inasmuch as the possession of Government had been founded on the attachment of 1828, which was in the nature of taking possession in trust and for the benefit of the party who should succeed in establishing a title to the land. Government appears to have acquiesced in that view, and certainly have not appealed from the Decree which gave the land which had been awarded to them by the Revenue authorities to the *Bengal* Coal Company, the Plaintiffs in this suit, and the Respondents on this appeal. The other parties, who were also made parties to the suit, and who claimed portions of the land, which were the subject of the Award of the Revenue authorities, seem also now to have abandoned their respondents, the *Bengal* Coal litigation is, therefore, reduced to a question between the appellants and the Respondents, the *Bengal* Coal Company. Nor can the Appellants, if they were to succeed on this appeal, do more than obtain the dismissal of the Respondents' suit, and thus obtain an affirmance of their right to hold the 625 *beegahs*



of land. They cannot in this suit assert a title to the larger portion of the land, which the Respondents have recovered from Government.

It is obvious, from what has been already stated, that the question is simply one of boundary. The Appellants claim title under Government, which held *khas* a large portion of Forest land situate in this District and apparently never included in the Decennial Settlement. Out of this land, no doubt, that estate which is admittedly in the possession of and belongs to the Appellants has been carved. On the other hand, the *Chatterjees* derive title under a *Mocurrery* grant from the *Rajah* of *Burdwan*, and it must be held, that the land so granted to them was part of the settled estate of the *Rajah* of *Burdwan*. It has appeared to their Lordships, in the course of this discussion, that a more easy, at least a more satisfactory, mode of deciding this dispute might have been found in the ascertainment (if that were possible) of the real boundaries between the settled *mehals* of the *Rajah* of *Burdwan*, and the Forest lands which remained after the Perpetual Settlement in the hands of the Government, because it is clear that, on the one hand, the *Chatterjees* claim nothing except what they got from the *Rajah* of *Burdwan*, and, on the other hand, that the Appellants claim nothing except what they derived from the Government. That, however, has not been the course which the parties have thought fit to take. They have, however, adduced a good deal of the evidence generally given in boundary cases; the issue being—what are the boundaries of the estate of *Gopeenathpore*, which is the *Mocurrery* of the *Chatterjees*, and has now passed to the *Bengal Coal Company*, and what is the true boundary of the

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estate of *Gopeenathpore*, which is in the undoubted possession of the Appellants.

It has frequently been said at this Board, that of all the questions which are brought here from *India* there is no question of fact which is so improper to be brought for final decision by this Tribunal as a question of boundary, since the decision of that question, particularly where the boundary line is to be run through a Forest or a tract of waste land, must depend so much upon local investigation and local inquiry, and on that sort of knowledge which only Officers in *India*, who are conversant with such disputes, can acquire. Accordingly, their Lordships will never interfere with the finding of an Indian Court upon a question of boundary unless they are clearly satisfied, that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make the grounds for an Order reversing or varying the decree. This case, no doubt, has been argued very much on that assumption. The long argument of Mr. *Leith* has turned mainly upon the miscarriage, or rather the alleged miscarriage, of the High Court in dealing with a particular document, viz., the copy of the confirmatory *Sunnud*, which has been so much impeached.

We will at once go to the consideration of that document. With reference to the general question of the admissibility of copies, and the mode in which the Courts in *India* deal with them, their Lordships are desirous to make some observations. It has been repeatedly ruled here, that these questions are not to be dealt with by the strict rules that would prevail at a *Nisi prius* Trial in *England*, where the



question is, whether the document ought to be submitted at all to the jury. The way in which evidence is brought in in *India* almost precludes that rule. On the other hand, their Lordships are undoubtedly of opinion, that when a copy has been in any way received, and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original; that there should be some account given of the original, and sufficient reason assigned why the original is not produced, and why the parties rely upon the copy. In all cases, the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question and the weight and value which he will attach to it. There is, no doubt, a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit, as in the case cited by Mr. *Leith* of *Syud Abbas Ali Khan v. Yadeem Ramy Reddy* (3 Moore's Ind. App. Cases, 156), is actually brought upon the instrument of which a copy is tendered, and the whole cause of action depends on the proof of the original instrument. In the latter case strict proof may properly be required.

Dealing with the present document, their Lordships are not prepared to say, that the High Court has miscarried, in so far as it has come to a conclusion that this document is genuine. It is a very ancient document. It cannot for one moment be contended, that it was fabricated for the purposes of this

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suit. No doubt what we have actually on the record is a copy of a copy, but it is a certified copy of a document which is shown, though a copy, to have been produced in the earlier suits. The degree of credit which it has acquired in those suits, and the effect which has been given to it in those suits, may be more open to question; and there is no doubt great weight in many of the observations of Mr. *Leith*, that those decisions did not positively affirm the genuineness of the document or proceed wholly on the document so as in effect to involve the decision of its genuineness. On the other hand, it is to be observed, that it was produced in one of those suits against the *Rajah* of *Burdwan*; that it was not impeached or treated as other than a genuine document, and it is impossible to say that it did not, by being then produced, acquire some degree of merit.

The effect of the document as against Mr. *Leith's* Clients is of course another question. If the document is treated as a genuine instrument, it does not at all follow, that of itself it would prove the title of the Respondents against the Appellants, because it is a mere statement by the *Rajah* of *Burdwan* that those are the boundaries of what he professes to grant, and it is possible to conceive cases in which, if there had been a conflict between the *Rajah* of *Burdwan* and the Government as to the boundaries of his *zemindary*, this assertion of a right to grant all the land comprised within the boundaries specified would be no evidence against the Government that this *zemindary* extended so far; it is at most a proof of an early assertion on the part of the *Rajah* of *Burdwan* that the land which he purported to grant in *Mocurrery* to the *Chatterjees* did extend so far. Their



Lordships conceive that the reason why this has been treated as the turning point of the case is, that the supposed spuriousness of the document and its assumed inconsistency with the earlier documents were the grounds upon which Mr. *Lawford*, the Collector, reversed the finding of Mr. *Ross*, the Deputy Collector, a decision which led to the final adjudication of the Revenue authorities which is impeached by this suit. In their Lordships' opinion, this decision of Mr. *Lawford* cannot be supported. For the reasons already given, their Lordships think, that the document is not spurious. Nor can it be properly said to be inconsistent with the earlier document. It contains something which the earlier document did not contain, but it contains nothing which is inconsistent with the earlier document. It gives boundaries which the other did not give, but it does not give boundaries which differ in any degree from any which the earlier documents gave either expressly or by implication.

It is, however, to be observed, that the decision of the High Court does not rest upon that document wholly, or indeed further than this, that if the document be genuine, it gets rid of that reversal of Mr. *Ross's* Order, and throws the parties back into the position in which Mr. *Ross's* Award would have left them. The judgment of the High Court proceeds upon the whole of the evidence in the cause which appears to their Lordships to be amply sufficient to support the finding of the Court. There is, first, Mr. *Ross's* own finding, the result of the local investigation on the spot, It is confirmed to a certain degree by the other local investigation which takes place by the *Ameen*, and their Lordships cannot but

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remark, that unless there be very good grounds for dissenting and differing from those reports made upon local investigations, the Courts even in *India*, and *à fortiori* the Court in *England*, in dealing with boundary questions, ought to give great weight to them and to be guided by them. Supposing, then, that the *onus* of proof in this case was much heavier on the plaintiff than it really was, there was ample ground for saying, that he had proved enough to throw the Defendants upon proof of their title; and looking at the petition which limits the amount of their holding to the 1,800 odd *beegahs*, and to the other circumstances remarked upon by the High Court, their Lordships find it impossible to come to the conclusion that the High Court was not amply warranted in the finding to which it came and in reversing the decision of the *Zillah* Judge, which appears to their Lordships to rest upon very unsatisfactory grounds, and to treat the case as if the whole question turned upon the *Sunnud*.

Their Lordships, therefore, must humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

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KRISTO KINKUR ROY and another .. *Appellants*;

AND

RAJAH BURRODACAUNT ROY and } *Respondents.\**  
another ... }

*On appeal from the High Court of Judicature at  
Fort William, Bengal.*

IN this case, the question turned upon the construction of the 19th and 20th sections of the

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Jan., 1872.

Present :—Members of the *Judicial committee* :—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor :—The Right Hon. Sir Lawrence Peel.

Review of  
the authorities with respect to the period of limitation, under sects. 19 & 20 of

Act, No. XIV. of 1859, applicable to Decrees of the High Court made on appeal from the Courts in the *Mofussil*, in applying to the Lower Courts for process of execution of the High Court's Decree.

A Decree of the High Court affirming, on appeal, a Decree of the District Court, is subject to the three years' limitation prescribed by sect. 20 of Act, No. XIV. of 1859, and operates as a bar to the issue of process of execution by the Lower Court, if not applied for within three years, unless "some proceeding," as provided by that section of that Act, has been taken to keep alive the High Court's Decree.

In *March*, 1862, a Decree was made by a *Mofussil* Court, which, on appeal, was affirmed by the High Court in *June*, 1863. An appeal from the High Court was interposed to the Queen in Council, and pending such appeal a petition by both parties was presented in *April*, 1865, to stay proceedings for two months to effect a compromise, which did not take place, and afterwards, in the same year, no steps having been taken, the High Court, in *May*, 1866, struck out the appeal. In 1867, the Decree-holder applied to the Lower Court for execution of the Decree, but that Court refused to issue execution on the ground, that the Decree was barred by the three years' limitation provided by sect. 20, and such holding was confirmed on appeal by the High Court. Held, by the Judicial Committee, following *Maharajah Dheeraj Mahtab Chund, Bahadoor v. Bulram Singh* (13 Moore's Ind. App. Cases, 479), that when the parties consented to the petition to stay proceedings there was such a *contestatio litis* touching the appeal to England as con-



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Limitation of suits Act, No. XIV. of 1859 (a). involving the point, whether the three years' under sect. 20, or twelve years' limitation under sect. 19, of that Act operated as a bar against a Decree-holder in

(a) These sections were as follows :—

Section 19. "No proceeding shall be taken to enforce any Judgment, Decree, or Order of any Court established by Royal Charter, but within twelve years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same, unless in the meantime such Judgment, Decree, or Order shall have been duly revived, or some part of the principal money secured by the Judgment, Decree, or Order, or some interest thereon shall have been paid, or some acknowledgement of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his Agent, to the person entitled thereto, or his Agent, and in any such case no proceeding shall be brought to enforce the said Judgment, Decree, or Order, but with twelve years after such revivor, payment, or acknowledgment, or the latest of such revivors, payments, or acknowledgments, as the case may be ; Provided that three years next after the passing of this Act every Judgment, Decree, and Order which may be in force at the date of the passing of this Act shall be governed by the law now in force, anything therein contained notwithstanding.

Section 20. "No process of execution shall issue from any Court not established by Royal Charter to enforce any Judgment, Decree, or Order of such Court, unless some proceeding shall have been taken to enforce such Judgment, Decree, or Order, or to keep the same in force within three years next preceding the application for such execution.

Section 21. "Nothing in the preceding section shall apply to instituted "some proceeding," provided for by sect. 20 of the Act, No. XIV. of 1859, and took the case out of the operation of the three years' limitation provided by that section.

Whether Her Majesty's Order in Council, made on an appeal from the High Court, not being strictly a Decree of a Court, but an act done by the Queen by virtue of Her prerogative, upon the recommendation of a Committee of Her Privy Council which prescribes what shall be the final Decree in the suit, and leaves it to be executed by the ordinary process of the Courts in *India*, is subject to the Limitation of suits Act, No. XIV. of 1859, *Quære?*



applying for execution to enforce a judgment of the Lower Court, which had been affirmed on appeal by the High Court.

The facts which gave rise to this question were shortly these:—

On the 25th of *March*, 1862, a Decree was made by the *Zillah* Court of *Moorshedabad* in a suit instituted by the Appellants against the Respondents under an agreement for maintenance in her favour.

The first Respondent, *Rajah Burrodacaunt Roy*, appealed to the High Court, and that Court, on the 8th of *June*, 1863, dismissed the appeal with costs, and affirmed the Decree of the Lower Court.

The *Rajah* then appealed to Her Majesty in Council, but pending such appeal, a compromise was proposed, and on the 8th of *April*, 1865, the *Rajah* petitioned the High Court to stay the proceedings on the appeal for two months to enable the compromise to be carried out, which was consented to by the Appellants.

The proposed compromise was not carried out, but the *Rajah*, in *April*, 1865, paid Rs. 500 on account of the sum decreed.

On the 9th of *May*, 1866, Mr. Justice *Kemp* ordered the appeal to be struck off for want of prosecution.

On the 22nd of *April*, 1867, the Appellants ap-

any Judgment, Decree, or Order in force at the time of the passing of this Act, but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

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plied to the Lower Court for execution of the Decree, the amount sought to be recovered being Rs. 18,240, and costs, after giving credit for the Rs. 500 paid as before stated.

Upon such application for execution, the Judge passed the following Order :—

“ On presentation of this petition the Petitioner's *Vakeel* was called upon to show *primâ facie* ground that this Decree was not barred by sect. 20 of Act, No. XIV. of 1859, since it was passed on the 8th of *June*, 1863, and no step had been taken to keep it in force. The only proceeding taken points to one since taken by the Debtor in the High Court, preliminary to appealing to her Majesty's Privy Council. It would appear that that Court postponed passing any Order on the Debtor's petition for leave to appeal, because it was brought to its notice that the parties were inclined to compromise the suit. The Debtor allowed his petition to be struck off by default, and the Creditor has taken no steps to keep the Decree in force. Under these circumstances, I am of opinion, that execution cannot be taken. The application cannot be admitted.”

The Appellants, on the 26th of *June*, 1867, appealed from such Order to the High Court, on the following grounds :—First, that their application was clearly in time, being within three years from the 9th of *May*, 1866, when the judgment Debtors' appeal to the Privy Council was struck off, and an operative Decree secured to them, and that the Court below was wrong in disallowing execution on the ground of limitation. Secondly, that their application for execution was likewise within three years of the 8th



of *April*, 1865, on which date they had presented a petition in the Privy Council appeal case, and the appearance in that case was a proceeding sufficient to keep their Decree in force; and thirdly, that the Court below was wrong in applying the three years' limitation to their Decree, which was substantially a Decree of the High Court; at all events, in respect of the costs awarded by the High Court.

On the 27th *November*, 1867, the High Court, the Justices *Jackson* and *Hobhouse* presiding, rejected the appeal, save as to granting execution for the costs awarded by the High Court on the dismissal of the appeal.

The judgment of Mr. Justice *Louis S. Jackson* was in these terms:—"The Appellants in this case obtained their decree in the *Zillah* Court on the 25th of *March*, 1862. That decree was affirmed on appeal by the High Court on the 8th of *June*, 1863, the Appellant being ordered to pay the costs of the appeal. The effect of that decision being, I apprehend, to leave the Plaintiff at liberty to execute his original Decree within three years from 8th of *June*, 1863, as provided by section 20, of Act, No. XIV. of 1859, and also to give him a Decree of the High Court, which he might execute for costs of the appeal within the time limited by law for the execution of Decrees of that Court. The law in force on that subject is the Act above cited, No. XIV. of 1859, in which no particular Courts are specified; but the Courts of Judicature in *British India* are distinguished as Courts established by Royal Charter, and Courts not established by Royal Charter. The 19th section of the Act provides for execution of

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Decrees of the Courts established by Royal Charter, and the 20th and 21st sections provide for the like matter in respect of Courts not so established. At the time of the passing of that Act the chief appellate jurisdiction in this Country over the Courts in the *Mofussil*, was vested in the *Sudder Dewanny Adawlut*, which was a Court not established by Royal Charter, and the Decrees of that Court would unquestionably be executed under the provisions of sections 20 and 21. At that time the only Court in *Bengal* established by Royal Charter was the late Supreme Court. Both these Courts were, in accordance with the Imperial Statute, 24th & 25th *Vict.* c. 104, sect. 8, abolished on the establishment of the High Court, which is a Court established by Royal Charter, and which made the Decree under consideration. By the 11th section of the Act cited all provisions then in force in *India*, of any Acts of the Legislature of *India*, which at that time were applicable to the Supreme Court at *Fort William*, became applicable to the High Court. Apparently, therefore, a Decree of the High Court, as a Decree made by a Court established by Royal Charter, falls under the 19th section of Act, No. XIV. of 1859; and if that section be regarded as a provision applicable on the 1st of *July*, 1862, to the Supreme Court, it became on that day applicable to the High Court by reason of its establishment. A doubt at one time occurred to my mind, whether the provisions of section 19, which, when it was passed, undoubtedly referred to Decrees of original jurisdiction, should not be still restricted in its operation to such Decrees. But I find nothing in the Act of Parliament which discriminates between the different jurisdictions



of the Court, so as to warrant any such restriction ; section 12 does not contain any such matter. Nor, indeed, can I see any reason why the Decrees of the High Court in its appellate side should have a less extended efficacy or vitality than those of the same Court in its original side. The proceedings in both being governed by the Code of Civil Procedure, to which the law of limitation is at least very nearly allied. It is objected to as an anomaly, that while the High Court has merely inherited the power of the late *Sudder* Court, in respect of appeals from the *Mofussil* Courts, and while the *Sudder* Court was included in the three years' rule, the High Court, which has succeeded to the functions of the late Supreme Court merely for the purpose of original jurisdiction, should use for the purposes of what may be called its *Sudder* jurisdiction, a provision applicable to the Supreme Court's Decrees in original suits. But this observation seems to me to rest upon a fallacy. Those who make it assume that the High Court has two parts, of which one represents the late Supreme Court and exercises its powers, the other representing the late *Sudder* Court, with the jurisdiction and authority of that Court ; whereas in fact the High Court is one amalgamated Court, possessing and exercising all jurisdiction, and every power and authority whatsoever in any manner vested in any of the abolished Courts (24th & 25th *Vict.* c. 102, sect. 9), and I am of opinion, that when any power vested in the late Supreme Court can be usefully brought to the aid of the Court acting in its appellate jurisdiction, it would be our duty to exercise such power. Otherwise the 11th section of the Act of Parliament would have been quite differently worded, and it would have

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been enacted that provisions applicable respectively to the Supreme *Sudder* Courts should apply according as the Court was exercising original or appellate jurisdiction. I cannot, therefore, but hold that the Plaintiff was intitled to execute his Decree for costs of the High Court within twelve years, as declared by the 19th section of the Act, No. XIV. of 1859. This, however, does not extend to the Decree below, which was affirmed by the High Court, and it remains only to consider, whether execution of that Decree was barred, as the Judge decided, by the terms of section 20. The only proceeding to which the Plaintiff could refer us, as having been taken by him within three years next preceding the application to execute, was the filing of a petition during the proceedings of an appeal to Her Majesty in Council, which was commenced by the Defendants, but not prosecuted. The petition set forth that the parties intended to compromise, and asked for a delay, which was granted, and the appeal was afterwards struck off the file, on the Appellants failing to proceed. The filing of this petition, it appears to me, cannot be looked upon as a proceeding to enforce the judgment, or to keep it in force, and consequently execution of that Decree was properly refused. The Judge's decision must be modified in accordance with our opinion.

The judgment of Mr. Justice *Hobhouse*, after shortly stating the facts, was as follows :—"I agree in the Order which my Brother *Jackson* would give in this case. The point taken in its special appeal is, that the Decree, execution of which was applied for, was, if not altogether, at least as to costs, a Decree of the High Court, that the High Court is a Court estab-



lished by Royal Charter, and that the period of limitation which is applicable is not the period of three years under section 20, but the period of twelve years under section 19 of the Act, No. XIV. of 1859. I entertain no doubt but that the Decrees of 1862 and that of 1863 are two distinct and separate Decrees, of different Courts. The Decree of the High Court of 1863 affirmed that of the Court below, and, therefore, the Decree of this latter Court remained in its integrity. But the Decree of the High Court went further, it did that which the Decree of the Lower Court could not have done; it directed that the costs incurred in proceedings before itself should be paid by the Appellant. It is very true, as contended by the learned counsel, Mr. *Montrion*, that when an appeal is dismissed by the High Court, or any appellate Court, costs at least, as a matter of course, follow; but the Decree for such costs is not the less in fact a Decree of the appellate Court, and the mere circumstance that, under the rules of the Code of Civil Procedure, the Decree has to be put in execution in another Court (section 362) does not alter the character of the Decree,—it is still a Decree of the appellate Court. I hold, then, that the Decree of the High Court of 1863, is on the one hand a distinct Decree, but that on the other hand it is a Decree for costs of that Court only. The next question is, whether section 19, or section 20, of Act, No. XIV. of 1859, contains the law applicable to execution. [The learned Judge read the sections, *ante*, p. 466 and proceeded.] The Decree in this instance is a Decree of the High Court on its appellate side, and the High Court is a Court established by Royal

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Charter, and it follows within the unmistakable meaning of words that the limitation prescribed in section 19, of twelve years, is the limitation applicable to the Decree before us. But Mr. *Montriau* contends, that the High Court on its appellate side, in this particular case, is merely exercising the power which the *Sudder Dewanny Adawlut* would have exercised; that when the Act, No. XIV. of 1859, was passed, the provisions of section 19 applied as clearly only to the Supreme Court as the provisions of section 20 did to the *Sudder Dewanny Adawlut*; that it follows, that the provisions of the latter section apply now to the case before us, and that to hold otherwise would be to hold that one law applied to one part of what is substantially one and the same Decree, and another law to another part. There can, I think, be no doubt that, up to the 1st of July, 1862, when the present High Court was, established, Decrees of the *Sudder Dewanny Adawlut* were governed by the limitation contained in section 20, and Decrees of the Supreme Court by that of section 19; and it would seem to follow that when the present High Court was intended to stand in the place of the *Sudder Dewanny Adawlut* on the one side, and of the Supreme Court on the other, it could only have been intended that the law of limitation which applied to the *Sudder Dewanny Adawlut* and the Supreme Court respectively, before they were amalgamated, should apply to the Court which took their places after they were amalgamated. And, to my mind, there is a manifest absurdity in the idea, that a Decree which, if it had been given by the *Sudder Dewanny Adawlut* on the 30th of June, 1862, would have been privileged to but three years' limitation, should,



because it was given by a Court under a different name, but which still represented the same *Sudder Dewanny Adawlut*, on the 1st of July, 1862, be privileged to twelve years' limitation. I cannot, therefore, doubt but that it was the intention of the Legislature that Decrees of the High Court passed in appeal from Courts not established by Royal Charter, should be subject to the limitation prescribed by section 20 of the Act. But I think it would be quite unjustifiable in us, sitting as interpreters of the law, to follow what we believe to be the intention of the Legislature, when the terms of the law are directly in conflict with such supposed intention. And here it seems to me the terms are quite plain. Section 20 is declared distinctly to apply to Decrees of Courts 'not established by Royal Charter,' section 19 to Courts 'established by Royal Charter.' The High Court is a Court established by Royal Charter. The Decree before us is a Decree of the High Court for costs of that Court. I hold, therefore, that, inasmuch as the Decree of date June, 1863, is a Decree of a Court established by Royal Charter, and inasmuch as the Appellants have proceeded to execute it within twelve years, they are in time, and I would set aside so much of the judgment of the Court below as refused Appellants permission to execute it."

From the Decree founded on the judgment of the Court the present appeal was brought.

Mr. J. D. Bell, and Mr. J. Cutler, for the Appellants.

The High Court was wrong in applying the limitation of three years prescribed by section 20 of Act, No. XIV. of 1859, instead of giving effect to the

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19th sect. of that Act. Our contention is, that the *Zillah* Court's Decree of the 25th of *March*, 1862, became by the Decree of affirmance of the High Court, of the 8th of *June*, 1863, a Decree of a Court established by Royal Charter, in which execution could, under sect. 19 of the Act, No. XIV. of 1859, issue within twelve years from the passing of the original Decree, as held by the *Bengal* High Court in *Chowdhry Wahid Ali v. Mullick Mayet Ali* (a), *Ishan Chunder Chowdhry v. Jugrohuree Chowdrain* (b). So by the High Court in *Bombay*, *Ba'pura'v Krishna v. Mádhavre Ra'ma'v* (c), and also in *Madras*, *In re Arunachellathudayan*, *In re Veludayan* (d). The High Court was established by Royal Charter in 1862, and pursuant and by virtue of the Imperial Statutes, 24th & 25th *Vict.* c. 104, and 28th *Vict.* c. 15, the appellate branch of that Court was a Court established by Royal Charter, as the previous Supreme Court of *Calcutta* had been. It would be a strange anomaly, if the Decree of the High Court were to be treated as to Decrees, enforceable, as to the Order for payment of costs, within twelve years, but not enforceable as to the part of the Decree declaring the Court below to be correct, because no proceeding was taken to keep the same in force within three years; yet such would be the effect of the ruling by the High Court. Such law of limitation, however, does not apply, for the Decree was suspended by the pendency of the appeal to her Majesty in Council, and no proceedings to obtain execution of such Decree could have been successfully taken until the appeal was

(a) 6 *Ben. L. R.* 52. (b) 8 *W. R.* (Civil Rulings), 267.

(c) 5 *Bom. High Court Rep.* 214.

(d) *Mad. High Court Rep.* 215.



dismissed. The appearance on the 8th of *April*, 1865, in the proceedings on the proposed appeal to *England* by the Appellants, was within the meaning of the 20th sect. of the Act, No XIV. of 1859, and constituted "some proceeding" to keep the Decree of the Lower Court in force, within three years preceding the application for execution. That was the construction put on this section by this Tribunal in *Maharajah Dheeraj Mahtab Chund, Bahadoor v. Bulram Singh* (a); and by the High Court in *Bhubaneswar Debi v. Mahendra Nath Chowdhry* (b). *Syud Khan v. Jumal Beebee* (c); *Ram Sahaye Singh v. Degun Singh* (d); *Bipro Doss Gossain v. Chunder Seekur Buttacharjee* (e). Moreover, the petition of the Respondent of the 8th of *April*, 1865, must be taken as an admission that the debt mentioned in the Decree was due, so as to entitle the Appellants to a further term of three years from that date for the issue of process of execution.

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Sir *R. Palmer*, Q. C. and Mr. *Doync*, for the Respondents.

It was never intended, by the 12th section of the Statute, 24th & 25th *Vict.* c. 104, to make provision, previously applicable only to the Decree of the Supreme Court, a Court of first instance, applicable after the 1st of *July*, 1862, to a Decree of the High Court, the new appellate Tribunal, which was substituted for the *Sudder Dewanny Adawlut* in appeals from the *Mofussil* Courts. That is plain from the enactment in that section, that "from

(a) 13 Moore's Ind. App. Cases, 479, 488.

(b) 3 Ben. L. R. 33, Appx. (c) 5 W. R. (Miss), 19.

(d) 6 W. R. (Miss), 98. (e) 7 W. R. (Civil Rulings), 251.



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and after the abolition of the Courts, the High Court shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and all previous proceedings in the former Court shall be dealt with as if the same had been in the High Court." That is apparent, as it would not be in accordance with the saving part of that section, which declares "that any such proceedings might be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively." The words of the 19th sect. of Act, No. XIV. of 1859, "any Court established by Royal Charter," are confined to Courts so established and then in existence in *Bengal, Madras, and Bombay*. To hold otherwise would give rise to the "manifest absurdity" referred to by Justice *Hobhouse*, but which he considered himself bound by law to carry into effect; we submit, therefore, first, that the provisions of sect. 19 of Act, No. XIV. of 1859, are not applicable to executions of Decrees of the High Court; but, secondly, if that section be applicable to such Decrees, it applies only so far as the Judgment appealed against has held it to be so applicable, namely, to such additions to, or alterations, of the judgment of the *Zillah* Court as might be decreed by the High Court. By analogy, in this Country, a Decree of the House of Lords is a decree of the Court of Chancery. The cases of *Chowdhry Wahed Ali v. Mullick Mayet Ali* (a), *Ba'pura'v Krishna v. Madhavra Ra'ma'v* (b), *In re Arunachellathudayan* (c), cited by the Appel-

(a) 6 *Ben.* High Court Reps. 52.

(b) 5 *Bom.* High Court Reps. 214.

(c) 5 *Mad.* High Court Reps. 215.



lants, are distinguishable from this case. In respect to the three or twelve years' limitation in applying to carry the Decree into execution by the Appellants, we contend, that the limitation was, by sect. 20, three years, and that the limitation of twelve years prescribed by sect. 19, was never intended to be extended to Decrees of the High Court.

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Judgment having been reserved, was now delivered by

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The Right Hon. Sir JAMES COLVILE :—

This appeal, though the facts of it lie in an extremely narrow compass, has raised several questions of general importance and considerable difficulty.

The Appellants, on the 25th of *March*, 1862, obtained a judgment against the Respondents for the sum of Rs. 9,500, with interest, from the date of the plaint, and costs of suit on a claim founded on an Agreement to pay to the Appellant, *Kristo Kinkur Roy*, an allowance of Rs. 900 *per annum* by way of maintenance.

The Respondent, *Rajah Burrodacaunt Roy*, appealed against this Decree to the High Court of *Calcutta*, but by the Decree of that Court made on the 8th of *June*, 1863, it was ordered and decreed, that the Decree of the Lower Court should be, and the same was thereby affirmed; and that the Defendant Appellant, should pay to the Plaintiffs Respondents the sum of Rs. 350, being the costs of the appeal, with interest thereon at the rate of twelve



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*per centum per annum* from the date of the Decree to the date of realization.

A petition of appeal to Her Majesty in Council against the Decree was then presented by the *Rajah*. He tendered security for costs, and the usual reference was made to ascertain its sufficiency. But the security was never perfected. On the 8th of *April*, 1865, he presented a petition to the Court, suggesting that negotiations for a compromise between him and the Appellants were pending, and praying that proceedings in regard to the appeal to *England* might be stayed for two months. On the same day the Appellants filed a petition consenting to that application, and praying that the two months should be granted. The Court, on the 4th of *August*, 1865, made an Order "postponing the case for two months, as there were hopes of the parties coming to an amicable settlement." The two months expired on the 6th of *October*, and nothing came of the negotiations: and, on the 9th of *May*, 1866, the High Court struck the appeal off the file in default of prosecution.

On the 22nd of *April*, 1867, the Appellants made their first application to the *Zillah* Court for execution against the Respondents. Their application was in the tabular form prescribed by section 212 of the Code of Procedure, which requires the date of the Decree of which execution is sought to be mentioned with other particulars. The only Decree so specified was the Decree of the 25th of *March*, 1862. But the fact of its affirmance on appeal was stated in the next column, and the amount sought to be levied included the Rs. 350 decreed by the



High Court as the costs of the appeal. On the 27th of *April*, 1867, the *Zillah* Judge rejected the application for execution, on the ground, that it was barred by section 20 of Act, No. XIV. of 1859, no step having been taken since the 8th of *June*, 1863, to keep the Decree in force within the meaning of that section.

The Appellants appealed from that decision to the High Court, which Court, on the 27th of *November*, 1867, ruled, that in so far as the Appellants sought to realize the amount decreed to them by the original Decree, their application for execution fell within the three years' limitation of the 20th section; but that, inasmuch as their claim for Rs. 350, the costs of the appeal, rested on the Decree of the High Court, and that was a Court established by Royal Charter, they were entitled, under the 19th section of the Limitation Act, to sue out execution for that amount at any time within twelve years from the date of that Decree; and the case was sent back to the *Zillah* Court with instructions to deal with it accordingly. The Appellants have brought this appeal against so much of this Order as held that their right to execution for any part of their demand was barred, but there has been no cross appeal against that part of the Order which was in their favour.

The argument on this appeal has raised the following questions :—

First, is the execution of a Decree of the High Court made on appeal from one of the Courts in the *Mofussil* to be governed by the 20th or by the 19th section of Act, No. XIV. of 1859? or, in other words,

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is it subject to the three years, or to the twelve years, rule of limitation ?

Secondly, what is the effect of a Decree of the High Court affirming a Decree of a *Zillah* Court ? Is it to be taken to incorporate the latter in itself, so that for the purposes of execution, the Decree to be executed is to be taken to be a Decree of the High Court ?

Thirdly, if, on any ground, the Decree to be executed in this case is to be deemed subject to the three years' limitation, had anything sufficient to keep it in force within the meaning of the 20th section been done within three years of the date of the application for execution ?

Upon the two first and general questions there have been conflicting decisions by the High Court in *India*.

The Order under appeal appears to have been the earliest which decided that Decrees of the High Court were within the 19th section. It has been followed at least in one case in *Bengal* decided as lately as the 6th of *September*, 1870, *Chowdhry Wahed Ali v. Mullick Mayet Ali* (6 *Ben. L. R.*, p. 52) ; and it has been recognized as sound law by the High Court of *Bombay* in the case of *Ba'pura'v Krishna v. Madhavra Ra'ma'v* (5 *Bom. High Court Reps.*, 214). But in two cases, *In re Arunachellathudayan* and *In re Veludayan* (5 *Mad. H. C. Apps.*, 215), decided by the High Court of *Madras*, on the 4th of *March*, 1870, it was ruled by Chief Justice *Scotland*, and Mr. Justice *Bittleston* (apparently without any dissent on that point on the part of the other Judges composing the



Full Bench of the Court), that a Decree of the High Court made on appeal from a *Mofussil* Court, is not a Decree of a Court established by Royal Charter, within the meaning of the 19th section of the Limitation Act, and is a Decree subject to the provisions of the 29th section of that Act. It may be observed that, neither in these *Madras* cases, nor in that decided at *Bombay*, was the determination of this question essential to the decision of the Court upon the particular appeal before it ; since in none of them had the period of three years' limitation, if calculated from the date of the Decree of the appellate Court, expired. This ruling, however, of Chief Justice *Scotland*, appears to have led to a reconsideration of the question by the High Court of *Bengal*.

Their Lordships find that in a case, *Ram Churn Bysack v. Luckhee Bornick*, not cited at the Bar during the argument (which is to be found among the Full Bench rulings of the High Court of *Bengal* in the 16th volume of the Weekly Reporter, p. 1 ; the 12th of *June*, 1871), a Division Bench of the High Court referred for the determination of the Full Bench two questions, in the following terms :—First, whether a Decree of the District Court affirmed on appeal by the High Court becomes a Decree of the last-mentioned Court ; and, secondly, whether execution of that Decree of affirmation passed by the High Court is to be governed by the provisions of section 19 of the Limitation Act, No. XIV. of 1859, or section 20 of that enactment, *i.e.*, whether the rule of three years or of twelve will apply. The Full Bench, consisting of the late Justice *Norman* (then acting as Chief

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Justice), and the Justices *Loch*, *Bayley*, *Macpherson*, and *Dwarkanath Mitter*, unanimously decided the first of these questions in the affirmative ; and ruled on the second, that when, under section 361 of the Code of Procedure, a Decree of the High Court on its appellate side is transmitted to the District Court, which passed the first Decree in the suit for execution, it will have the effect of a Decree of such Court, and must be executed within the period limited by the 20th section of Act, No. XIV. of 1859.

The preponderance, therefore, of authority in *India* is now in favour of the proposition, the execution of Decrees of the High Court, made on appeal from the District Courts, is subject to the three years' rule of limitations.

Their Lordships are of opinion, that this conclusion is correct.

The object of Act, No. XIV. of 1859, was to carry out a recommendation made many years before by the Law Commissioners for *India*, by passing one general law of limitation applicable to all Courts in *India*. It is hardly necessary to remark that the Legislature, in framing the Act, had then to deal with two distinct judicial systems—the one consisting of what had been the Courts of the East India Company, and may here be called the *Mofussil* Courts ; the other, the Courts established in the Presidency Towns and elsewhere by Royal Charter, and administering to all within their jurisdictions, subject to certain statutory exceptions and modifications, the law of *England*. The law of limitation which governed the former was to be found in the Regulations which had no force within the Presidency Towns ; whilst the law of limitation which governed



the latter consisted of the Statute of *James* the First, together with such other portions of the Statute Law of *England* applicable to the subject (if any) as had been introduced into *India*, and the general rules touching the effect to be given to lapse of time which depend on the decisions of the Courts in *England*. It is not surprising that, in framing a law designed to be common to both systems of judicature, it was deemed necessary to make certain exceptions to the general rule of uniformity. And it may be presumed that, in dealing with this matter of execution, the Legislature was moved by certain reasons which approved themselves to the minds of those who were conversant with the administration of justice in the *Mofussil*, to subject the execution of the Decrees of the *Mofussil* Courts, whether of appellate or of original jurisdiction, to the three years' limitation; whilst, on the other hand, being pressed by the weight and value which the Law of *England* gives to a judgment or Decree of a superior Court, it determined not to reduce the period for enforcing the Decrees of the Supreme Courts to less than twelve years. Hence the distinction made by the 19th and 20th sections of the Act, in which the term "Courts established by Royal Charter" was obviously used not by reason of anything inherent in every Court established by Royal Charter, but simply because it was thought to define (whether happily or not it is needless to inquire) certain existing Courts, viz., the Supreme Courts in the three Presidency Towns, and the Recorder's Courts in the Straits Settlements, and possibly to include other Courts of similar constitution and functions, which might thereafter be established. The same term, it may be observed,

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is to be found in the preamble of Act, No. VIII. of 1859 (the Code of Procedure), which, when first passed, was not intended to have operation in the Supreme Courts.

That being so, we have to consider how the question is affected by the subsequent amalgamation of the two systems of Judicature, and the establishment of the High Courts by Letters Patent under the powers given by the 24th & 25th *Vict.* c. 104, and the 28th *Vict.* c. 15. It will be convenient to speak only of the High Court of *Bengal*. The general scheme of the amalgamation was to constitute one general Court, of which the Judges sitting in various divisional Courts were to exercise the functions both of the Supreme Court and the appellate *Mofussil* Courts (the *Sudder Dewanny Adawlut* and the *Sudder Nizamut Adawlut*), all of which were abolished.

The powers and jurisdiction of the Supreme Court, with some slight modification of the latter, were transferred to the High Court, to be exercised by it as a Court of original jurisdiction; and the powers and jurisdiction of the appellate *Mofussil* Courts were transferred to it, to be exercised by it as an appellate Court. But the law to be administered by it as a Court of original jurisdiction was substantially that previously administered by the Supreme Court; whilst that to be administered by it on appeal from the *Mofussil* Courts was necessarily that of those Courts. The Code of Procedure (Act, No. VIII. of 1859) was indeed made the procedure of the Court in its original as well as in its appellate jurisdiction, and superseded the procedure which had previously obtained in the Supreme Court. But that Code did not touch the subject of limitation,



which continued to be regulated by Act, No. XIV. of 1859.

So far, therefore, there can be no ground for inferring that there was any intention on the part either of Parliament or of the Crown to alter the period within which a Decree made on appeal from a *Mofussil* Court could be executed. The Decree, like the Decree of the former *Sudder Dewanny* Court, was to be sent down to the Lower Court, and entry to be made of it in the register of the Lower Court, and execution sued out there. Every reason of policy which induced the Legislature to require that execution to be issued within three years was, presumably, as operative after the amalgamation of the Courts as it was before that event. Accordingly, one of the learned Judges who decided the case now under appeal, has admitted that his construction involved consequences "absurd" in themselves, and, presumably, contrary to the intention of the Legislature. He felt, however, bound by the words "Courts established by Royal Charter." It seems to their Lordships, considering the date and history of the Limitation Act, No. VIII. of 1859, that the High Court of *Madras*, and the High Court of *Bengal* in its decision of the 12th of June, 1871, were warranted in holding that the High Courts, though unquestionably "Courts established by Royal Charter," in the broad and general sense of the term, were not when exercising their appellate jurisdiction from the *Mofussil* Court, such Courts within the meaning of Act, No. XIV. of 1859.

There remains the difficulty occasioned by the use of the words "such Court," which has been adverted to in some of the Indian cases. But if those words

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be held to import the Court issuing the process of execution, *i.e.*, the *Zillah* Court, the difficulty would equally have applied to the Decree of the former *Sudder* Court, which not being the Decree of a Court established by Royal Charter would have been subject to no rule of limitation. It seems necessary to construe the words "such Court" as meaning "any Court not established by Royal Charter within the meaning of the Act." On the whole, therefore, though it is to be regretted that the Indian Legislature did not, upon the amalgamation of the Courts, provide more precisely for the application of the Limitation Act, and possibly of other Statutes to the new Court, their Lordships are of opinion, that the first question ought to be determined in accordance with the rulings of the High Court of *Madras*, and the Full Bench of the High Court of *Bengal*. The sound and convenient rule is undoubtedly that the Court which has to execute the Decree of the High Court, should be governed by the rules which govern the execution of its own Decrees, and their Lordships do not feel constrained by the words of the Statutes or of the Letters Patent to adopt the contrary construction.

If this be so, the consideration of the second question is not necessary for the determination of this appeal; since it is admitted, that the period of three years, if calculated from the date of the Decree of the High Court, had expired before the application for execution was made.

Nor, indeed, is the general question, upon which there have also been conflicting decisions in *India*, of much practical importance; since it is admitted, that the date from which the three years are to be calculated is the date of the Decree of the appellate Court;



whether that Decree is to be treated as the decree to be executed ; or the appeal of which it is the termination is to be deemed " a proceeding taken to keep the original Decree in force." That an appeal prosecuted to a Decree would be such a proceeding is shown both by the judgment of the Full Bench delivered by Chief Justice *Peacock*, in the case of *Bipro Doss Gossain v. Chunder Seekur Buttacharjee*, (7th W. R. p. 521) ; and also by the Judgment of this Board, delivered by Lord *Cairns*, in the case of *Maharajah Dheeraj Mahtab Chand, Bahadoor v. Bulram Singh* (13 Moore's Ind. App. Cases, pp. 479, 488).

The state of the Indian authorities upon the general question seems to be this. In the case before us, the High Court obviously proceeded on the principle, that a simple decree of affirmance did not so incorporate the mandatory part of the original Decree as to make, for all purposes, the Decree of the appellate Court the sole Decree to be executed. And this ruling appears to have been followed in the case of *Chowdhry Wahed Ali v. Mullick Mayet Ali* (6 Ben. High Court Reps. p. 52), in which it was ruled that, in order to make the Decree of the appellate Court the final Decree in the suit for all the purposes of execution, it was necessary, that it should have decreed a material modification of the original Decree. The rule, so expressed, seems open to the objection of vagueness. The Full Bench of the High Court of *Bengal*, however, in the decision of the 12th of *June*, 1871, already referred to, has ruled that, whether the Decree of the Lower Court is reversed, or modified, or affirmed, the Decree passed by the appellate Court, is the final Decree in the suit ; and,

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in the words of Mr. Justice *Mitter* "as such the only Decree which is capable of being enforced by execution." And that is in accordance with the *Madras* decision already cited. Chief Justice *Scotland's* words are "whether that Decree be in affirmance, or reversal, or modification of the Decree appealed from, it becomes the final Decree in the suit, and therefore the Decree enforceable by execution."

The function of an appellate Court is to determine what Decree the Court below ought to have made. It may affirm, reverse, or vary the Decree under appeal. In the first case, it leaves the original Decree standing, superadding, it may be, an Order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given.

In all these cases the Decree of the appellate Court may be regarded either as a direction to the Lower Court to make and execute a Decree of its own accordingly, or as an independent Decree, whether it is to be executed by the appellate Court or by the Lower Court. In the latter case a further question arises, viz., whether the original Decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the Decree of the appellate Court as the sole Decree capable of execution, or whether both Decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other.

In this Country the nature and effect of a Decree on appeal would seem to vary according to the



nature of the Decree under appeal, the constitution of the appellate Tribunal, the proceedings in appeal, and the fact whether the record or merely a transcript is brought up. The determination, however, of the question before their Lordships must depend on the provisions of the Indian Code of Procedure. It is clear that, under that Code, whatever Decree is executed, is to be executed by the Lower Court, in which the record remains, or to which it is to be returned.

But sections 360, 361, and 362 (a), which prescribe the form of the Decree of the appellate Court, direct a copy of it to be entered on the Register, and treat that Decree as a Decree to be executed, seem to exclude the notion that it is a mere direction to the Lower Court to pass and execute a certain Decree.

(a) "Section 360. The Decree of the appellate Court shall bear date the day on which the judgment was passed. It shall contain the number of the suit, the names and descriptions of the parties, Appellant and Respondent, and memorandum of appeal, and shall specify clearly the relief granted or other determination of the appeal. It shall also state the amount of costs incurred in the appeal, and by what parties and in what proportions such costs and the costs in the original suit are to be paid.

"Section 361. A copy of the Decree or other Order disposing of the appeal, certified by the appellate Court or the proper Officer of such Court, and sealed with the seal of the Court, shall be transmitted to the Court which passed the first Decree in the suit appealed from, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the original register of the suit.

"Section 362. Application for execution of the Decree of an appellate Court shall be made to the Court which passed the first Decree in the suit, and shall be executed by that Court, in the manner and according to the rules hereinbefore contained for the execution of original Decrees."

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If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz. : that the execution ought to proceed on a Decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that, for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the *Madras* Court, and of the Full Bench of the *Bengal* Court, further than by saying, that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a Decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a Decree of affirmance so much of the Decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded Decree.

From a passage in the judgment of Mr. Justice *Mitter*, already referred to, it appears to have been decided in *India*, that what are there termed "the Decrees of the Privy Council," are not subject to any law of limitation. That question is not before their Lordships ; and if it ever arises, must be determined on its own merits.

The ground of the decision seems to have been, that the Order of Her Majesty in Council being an act done by virtue of Her prerogative, it was not competent to the Indian Legislature to limit the time within which that Order could be enforced.



Their Lordships desire to say, that they are not prepared, without full argument and consideration, to accept this ruling as correct. Should the question ever be brought here, it will have to be considered, whether the Order in Council, which is not, properly speaking, the Decree of a Court, but an Order of Her Majesty made on the recommendation of a Committee of Her Privy Council, does more than prescribe what shall be the final Decree in the cause, leaving it to be executed by the ordinary process of the Courts in *India*. It may well thus finally ascertain and define the rights of the parties without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence,—a matter with which the prerogative has no concern.

The result of what has been said is, that the determination of this appeal must depend on the third question, viz., whether any proceeding sufficient to keep the Decree in force within the meaning of the 20th section, was had between the 8th of *June*, 1863, and the 22nd of *April* 1867, the date of the application for execution. It has been argued, that the presentation of the petition of appeal to *England*, was “such a proceeding,” and that the period of limitation was to be calculated from the 9th of *May*, 1866, when that petition was finally dismissed.

It was further argued, that the filing by the Appellants of the petition consenting to the Respondent’s application for further time to prosecute his appeal was “such a proceeding,” and that the time was to be calculated from the date of that petition (the 8th of *April*, 1864), or from the 4th of *October*, 1865, when the two months granted expired. Their Lord-

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ships are of opinion, that there is no ground for the first contention; that the Respondent's petition of appeal, being a proceeding taken in order to destroy the Decree, cannot of itself be treated as a proceeding to keep it in force; and in this opinion they are supported by all the Indian authorities cited, except the observations of Mr. Justice *Holloway* in the *Madras* case. It is, however, admitted, that had the appeal to *England* been allowed, the present Appellants, being Respondents to it, and, as such, supporting the Decrees, would have been entitled to sue out execution at any time within three years at least after the final dismissal of that appeal.

The appeal, it is true, never was allowed, but during the period between the date of the presentation of the petition and that of its dismissal, the allowance of the appeal depended on the Respondents' compliance with the rules which regulate the admission and allowance of appeals to *England*; and the Appellants had a right to intervene and see that there was a compliance, with these rules, particularly with such of them as relate to security, and, in the event of non-compliance, to insist on the dismissal of the petition. In their Lordships' opinion there is, in this case, sufficient evidence that the Appellants did so intervene. The petition, by which they consented to the application for two months' further time, is pregnant evidence of this fact; for unless they had then been active parties to the proceedings their consent would have been unnecessary. Their Lordships, therefore, though they would have been glad to have had fuller evidence of what was actually done in this matter, have come to the conclusion, that there was, at that time, such a *contestatio* between the parties



touching the allowance of the appeal to *England*, as suffices to bring this case within the principle laid down by Lord *Cairns* in the case of *Maharajah Dheeraj Mahtab Chand, Bahadoor v. Bulram Singh* (13 Moore's Ind. App. Cases, p. 479) already referred to, and to relieve their Lordships from the necessity of depriving the Appellants of the fruits of what appear to be just Decrees by the application of the Act of Limitation.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal ought to be allowed; that the Orders of the *Zillah* Judge and of the High Court ought to be reversed; and that the Appellants ought to be declared entitled to sue out execution of the Decrees, and to recover also the costs of the proceedings in execution in both the Indian Courts. They will also be entitled to the costs of this appeal.

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MUSSUMAT BUHUNS KOWUR ... *Appellant*;

AND

LALLA BUHOOREE LALL, AND JO-  
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*On appeal from the High Court of Judicature,  
at Fort William, in Bengal.*

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A Purchaser of the equity of redemption sold in execution of a Decree, who had obtained a certificate as Purchaser, under sect. 259 of the Code of Civil Procedure, Act, No. VIII. of 1859, brought a suit for redemption and possession against the usufructory Mortgagee

THE question raised in this case was whether, under sections 259 and 260 of Act, No. VIII. of 1859 (a),

(a) The sections above referred to are as follows.—

259. "After a sale of immovable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the Purchaser at such sale, to the effect that he has purchased the right, title, and interest of the Defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest."

260. "The certificate shall state the name of the person who

Present:—Members of the *Judicial Committee*:—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

Assessor:—The Right Hon. Sir Lawrence Peel.

under a Deed of *sur-i-peshgee* (usufructory mortgage). Held (reversing the Decree of the High Court), that the Act, No. VIII. of 1859, was simply a Code of Procedure, not affecting existing law, and that the fact of the Plaintiff's title being certified as Purchaser was not conclusive by sect. 260 of that Act, to debar the Defendant who was in possession from pleading, that he was the real Purchaser, and that the purchase was made *benamee* for him by the certified Purchaser (as *benamee* transactions are not prohibited by sect. 260, or *per se* illegal), so as to ascertain the title of the certified Purchaser.

*Semle*: Sect. 260 is confined to a suit brought against a certified Purchaser, and does not embrace a suit brought by him against a party in possession.



the Code of Civil Procedure, in a suit brought by the certified Purchaser to redeem certain mortgaged lands, the Defendant, the Mortgagee in possession, was entitled to set up as a bar to the suit a plea that, although the Plaintiff was in fact such certified Purchaser, yet he had made the purchase *benamee*, on behalf of the Defendant, and was, therefore, not entitled to sue.

The circumstances, out of which the suit which raised this question arose, were as follows :—

In the year 1844, one *Motee Soondery Dassee*, as Proprietress of *Talook Doondhur*, executed a *zur-i-peshgee*, or usufructuary mortgage, of her *Talook* to *Brij Lall Opadhia*, the Husband of the Appellant, since deceased, under which he obtained possession, which after his death the Appellant retained.

In *January*, 1847, *Brij Lall Opadhia* and another obtained a money decree in respect of a different loan transaction personally against *Motee Soondery Dassee* for a sum of upwards of Rs. 16,000.

One *Ajoodhia Persaud* had obtained a Decree against *Brij Lall Opadhia*, and interest of the Decreeholder was purchased by *Gunga Persaud Tewary*, as the Appellant contended, on behalf of the Debtor, *Brij Lall Opadhia*.

*Gunga Persaud Tewary* having sued out execution in his own name of his purchased Decree against the interest of *Brij Lall Opadhia* in the money Decree obtained by him against *Motee Soon-*

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at the time of sale is declared to be the actual Purchaser, and any suit brought against the certified Purchaser on the ground, that the purchase was made on behalf of another person not the certified Purchaser, though by agreement the name of the certified Purchaser was used, shall be dismissed with costs.



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*dery Dasse*, the letter was, on the 21st of *January*, 1861, sold in execution, to the Respondent, *Lalla Buhooree Lall* for the sum of Rs. 1,000.

At the time of the sale the Respondent, *Lalla Buhooree Lall* declared that he purchased on his own account, and an Order issued giving him a certificate accordingly, and afterwards on the 10th of *July*, 1863, on his application another Order was issued for the substitution of his name for that of *Brij Lall Opadhia* to enable him to proceed to execution against the Debtor's property.

On the 16th and 24th of *July*, 1863, on the application of *Lalla Buhooree Lall*, Orders for the attachment of *Talook Doodhur* issued from the Judge's Court, and by another Order of the 29th of *August*, 1863, the sale of that *Talook* was fixed for the 5th of *October*, on which day the sale took place, and the *Talook* was sold to the Respondent, *Lalla Buhooree Lall*, as the highest bidder for Rs. 9,500.

On the 11th of *December*, 1863, the Judge ordered that a certificate should be granted to *Lalla Buhooree Lall*, according to the terms of section 259 of Act, No. VIII. of 1859. And on his subsequent application for possession in *December*, 1865, an Order for possession was passed, and the *Ameen* charged with that duty reported that he had given him possession on the 10th of *March*, 1866.

On the 5th of *October*, 1866, the present suit was instituted by the Respondents, *Lalla Buhooree Lall* and *Jokhee Lall* (who was a sharer in the first Respondent's purchase), against the Appellant and others. The plaint was framed simply as one for redemption of the mortgaged *Talook Doodhur*, and alleged, that the mortgage debt had been already.



satisfied by the usufruct, and offered, if this should not be so, to pay any balance remaining due.

So far as concerned the question of law raised by the appeal, the Appellant, as principal Defendant, by her answer pleaded, that the Respondent, *Lalla Buhooree Lall*, had purchased *benamee* on behalf of her Husband, whose *Mookhtar* she alleged he was.

Evidence was taken upon the question of fact raised by the first issue, viz.:—whether *Lalla Buhooree Lall* was the actual or nominal Purchaser.

The Principal *Sudder Ameen* of *Zillah Gya* (*Moulvie Itrut Hossein*), by his judgment, dated the 3rd of *June*, 1867, held upon the evidence, that it was satisfactorily proved, that the Respondent, *Lalla Buhooree Lall*, was, in fact, the *Mookhtar* of *Brij Lall Opadhia*, that the latter was the actual Purchaser of the  $8\frac{1}{2}$  *annas* share, and that the Respondent was only the nominal Purchaser; and that the Appellant was not prevented by anything contained in the 260th section of the Act, No. VIII. of 1859, from setting up her defence to the suit of the nominal Purchaser, and that inasmuch as the purchase of the property in dispute by *Brij Lall Opadhia* had been proved, the suit for possession of the property by the Respondent, *Lalla Buhooree Lall* the nominal Purchaser, was not admissible, and ordered the suit to be dismissed with costs.

The Respondents appealed to the High Court and in their grounds of appeal, stated, first, that under sect. 260 of Act, No. VIII. of 1859, and C. O., dated the 29th of *July* of the same year, the allegation in the answer, of purchase in a fictitious name was inadmissible; that the actual Purchaser was the person whose name was inserted in the certificate;

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and that it was contrary to law and equity to contend that the Plaintiffs were nominal purchasers. Secondly, that the reference made to the decision, dated 19th of *August*, 1866, relating to the case of *Koonj Beharee Lall* by the Principal *Sudder Ameen* in his judgment as an authority was wrong, that decision relating to a contention regarding an auction sale of property under the provisions of section 22 of Act, No. I. of 1835. Thirdly, that the purport of the decision of the 3rd of *February*, 1866, had been misunderstood by the Principal *Sudder Ameen*, as in that decision the principle laid down was, that if the person who obtained the certificate brought a suit for possession, or any action brought against him on the ground of ejection by him, then, in either case he should have the benefit of the rule laid down in section 260, of Act, No. VIII. of 1859; and fourthly, that the *onus* of the proof rested with the principal Defendant, who alleged herself to represent the real Purchaser; and that the Court below had not disposed of that point.

The hearing of that appeal took place on the 16th of *July*, 1868, before a Division Bench of the High Court, consisting of the Judges *Bayley* and *Macpherson*, when they reversed the Decree of the Principal *Sudder Ameen*, and remanded the suit, directing accounts to be taken between the Plaintiff, the Respondent, *Lalla Buhooree Lall*, as representing the Mortgagor, and the Appellant as representing the Mortgagee. The judgment of the Court, delivered by Mr. Justice *Macpherson*, stated that, as regarded the question of fact, they had arrived at the same conclusion as the Lower Court, that the Respondent, *Lalla Buhooree Lall*, was not the real Purchaser of the share at the sale, in execution of the Decree, but



that the purchase thereof was made by the late *Brij Lall Opadhia* in the Respondent, *Lalla Buhoree Lall's* name. It then stated, that the question of law was one of greater difficulty, and one that had never previously been decided; and after referring to case under sect. 36 of Act, No. XI. of 1859, and remarking that that section was, in substance, similar to sect. 260 of Act, No. VIII. of 1859, the judgment proceeded:—"Section 36 of Act, No. XI. of 1859, provides, that 'any suit brought to oust the certified Purchaser, on the ground that the purchase was made on behalf of another person, not the certified Purchaser, shall be dismissed with costs.' A question similar in many respects to the one now before us arose under that section, some time ago, before Mr. Justice *Seton Karr* and myself. The main difference in the position of the parties is, that in that case the certified Purchaser had, in the first instance, got possession, and was subsequently ousted by the Defendants, who pleaded that they were the real Purchasers, though the name of the certified Purchaser had been used. We decided (so far as this point was concerned) in favour of the certified Purchaser, being of opinion, that 'the fact that the Plaintiff is, by reason of what has occurred, obliged to come into Court to recover possession, does not, as it seems to us alter the position of the parties so as in any way to deprive the Plaintiff of any benefit which he might have had under section 36, if this suit had been brought against him as Defendant to oust him, the certified Purchaser, on the ground that the purchase was made on behalf of another person, not the certified Purchaser.' *Jadub Ram Deb v. Ram Lochun Muduck* (5 W. R., 56).

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The opinion thus expressed by us appears to me still to be right, and if it is, it is applicable equally to the present case, making every allowance for the difference existing in the circumstances under which the parties respectively appear in Court. It seems to me, that the object of the section 260, which, as has been decided, is to prevent disputes between a certified Purchaser and a person claiming that the certified Purchaser purchased *benamee* for him, would be defeated if the Defendant could make use of these facts by way of defence, which she could not make use of in order to prove her case, if she came before the Court as Plaintiff. In the view of the law which I take, it is clear, that the Plaintiffs, as the Purchasers of the equity of redemption, which was in *Motee Soondery Dasse*, are entitled to redeem the *zur-i-peshgee* mortgage and to recover possession, if it appears, upon taking the accounts, that the whole mortgage debt has been liquidated. With this declaration, we remand the case to the Lower Court to take the accounts. If, upon taking the accounts, a balance still appears to be due to the Defendants, the representatives of the Mortgagee, the Plaintiffs, will be entitled to possession, if they deposit the money in Court within one month from the date on which such balance is declared by the Lower Court. The costs of this appeal and those incurred in the Lower Court, heretofore, will depend upon the result of the remand. The Plaintiffs, however, will not in any event recover costs unless, upon taking the accounts, it appears that the mortgage debt had been paid in full before the present suit was instituted " (a).

(a) See case 10, W. R. Civil Rulings, 168.



The Appellant applied for a review of judgment, on the following grounds:—First, that the interpretation put by the High Court on sect. 260, of Act, No. VIII. of 1859, was erroneous, that section applying only to a suit of a Plaintiff, brought against the certified Purchaser, on the ground that the purchase was made *benamee* for the Plaintiff. Second, and that section 260 did not preclude the Defendant from opposing the Plaintiff's claim on the ground, that he had no right to bring the action, he being a party having no beneficial interest whatever in the property; third, that the Plaintiff was bound to prove that he had a beneficial interest in the subject matter of the suit, and that the High Court in concurrence with the Lower Court, found that the Plaintiff was but a *Benameedar* for the Defendant; fourth, that the unreported decision of the Court, dated 19th August, 1864, was in favour of the Defendants' contention; and if the Court doubted the correctness of that ruling, as also of the other rulings quoted, the Court should have referred the case to a Full Bench; and lastly, that the Court ought not to have remanded the case to the Lower Court with the directions contained in its decretal Order, without disposing of the second and third issues raised in the Court below; and upon both of which issues the Principal *Sudder Ameen* found, that the suit of the Plaintiff could not be sustained.

The Justices *Bayley* and *Macpherson* made an Order on this petition referring the case to a Full Bench of the High Court, which Order, after referring to two former judgments of the 19th August, 1864, in special appeal, No. 231 of 1864, and of the 7th July, 1863, in regular appeal, No. 55 of 1862,

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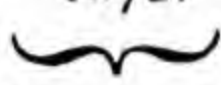
and stating that the same appeared to be in conflict with their judgment, sought to be reviewed, stated, as follows:—"The point referred to is this—A Purchaser of immovable property, sold in execution of a Decree, having obtained a certificate under sect. 259, of Act, No. VIII. of 1859, and having instituted, a suit to recover possession of the property purchased by ejecting the person who is in possession, is the latter (the Defendant in the suit) debarred, by the terms of sect. 260, from pleading, that although the Plaintiff is the certified Purchaser, he did not purchase in his own behalf, but merely on behalf of, and *benamee* for, the Defendant, and is, therefore, not entitled to recover possession? If the Defendant is not barred we must grant a review of judgment. But if the Defendant is barred the present application will be rejected by us."

The hearing of the case on review on the above point took place on the 9th of *September*, 1868, before the full Bench of the High Court, consisting of the Chief Justice, Sir *Barnes Peacock*, and the Justices, *Bayley*, *Jackson*, *Macpherson*, and *Glover*, when, Mr. Justice *Jackson* differing from the other Judges of the Court, who were agreed, separate judgment were delivered by the Chief Justice (expressing the opinion of the majority) and by the dissentient Judge, Mr. Justice *Jackson*.

The judgment of the Chief Justice was in these terms:—"I am of opinion, that the Defendant is debarred by Act, No. VIII. of 1859 from setting up the defence mentioned in the question, unless the Defendant is in possession, under circumstances, which amounted to a transfer to him of the title which the Plaintiff derived from the purchase. I do not mean



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to say, that he is debarred simply by sect. 260. He is, in my opinion, debarred by the general provisions of the Act, of which the provisions of sect. 260 must be looked at, in arriving at a just conclusion as to what were the real intentions of the Legislature. Section 259 of Act, No. VIII. of 1859, declares, that the certificate of purchase shall be deemed a valid transfer to the Purchaser of the right, title, and interest of the judgment-Debtor; the Act declares, that the Purchaser shall be put into possession of the property; and sections 261 to 266 inclusive, point out the mode in which possession is to be delivered. Section 260 enacts, that any suit brought against the certified Purchaser on the ground that, although the name of the Purchaser was used, the purchase was made on behalf of another person, shall be dismissed with costs. Sect. 260 seems to assume, that the certified Purchaser would have possession delivered to him, and provides that he is not to be turned out upon the ground that the purchase was *benamee*. It may be admitted, for the sake of argument, that the contention of the learned Advocate-General is correct, that there is no distinction in the *Mofussil* between legal and equitable estates. That, however, shows that, according to sect. 259, the certificate amounts to a valid transfer, both in law and in equity, of the right and interest of the Judgment-Debtor to the person who is declared to be the Purchaser. It appears to me, that the object of section 260 was to prevent any inquiry between the Purchaser *de facto* and any person on whose behalf he is alleged to have purchased, as to whether, the purchase was made *benamee* or not. This is consistent with the case, *Mussamut Shorosutty v. Gopeesondery Dasse*, *Marshall's Ben. App. Cases*, p. 423, and with the cases of *Mussumat Chunder-*



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*monee Dabea v. Watson*, in the *Sud.* Dec. for 1858, p. 1733, and of *Mahomed Hafiz v. Moulvee Abdool Alee*, *Sud.* Dec. for 1859, p. 287. With reference to the argument, that the Court would be assisting in carrying out a fraud if, in the case put by the question, it should refuse to admit the plea of the person in possession, I apprehend it is clear, that the Court which executed the Decree could not, at the instance of the real Purchaser, have refused to put the *Benamedar* into possession, under the provisions of sections 261 to 266, and that the real Purchaser could not have recovered that possession from him. If so, I see no greater objection to the Court putting him into possession under an execution in opposition to the wish of the real Purchaser. In many cases, as, for instance, under sections 264 and 265, the possession given to the certified Purchaser under an execution is not actual, but merely symbolical. In such cases, it may become necessary for the certified Purchaser to convert the symbolical possession into actual possession, by means of a suit. If the judgment-Debtor should, under an execution against himself, purchase, in the name of a third person, an estate belonging to himself in the possession of *Ryots*, the Court executing the Decree would, according to sect. 264, be bound to put the certified Purchaser into possession, by fixing a copy of the certificate of sale in some conspicuous place on the land, and proclaiming to the *Ryots* that the right, title and interest of the judgment-Debtor had been transferred to the certified Purchaser. In such a case, if the judgment-Debtor should induce the *Ryots* to continue to pay their rents to him, instead of paying them to the certified Purchaser, the possession delivered to the certified Purchaser under sect. 264,



by the Court which executed the Decree, would be fruitless if the certified Purchaser could not recover the rents from the *Ryots* or from the judgment-Debtor; so if a judgment-Debtor should, under execution against himself, purchase, in the name of another person, a debt due to himself from a third person, the Court, under sect. 265, would be bound to deliver the debt to the certified Purchaser, by a written order prohibiting the judgment-Debtor from receiving the debt, and his Debtor from making payment thereof to him. If, after such delivery to the certified Purchaser, the judgment-Debtor should induce his Debtor to pay the debt to him, the delivery of the debt to the certified Purchaser, under sect. 265, would be useless to him, if he could not sue the judgment-Debtor, or his Debtor, for the debt so purchased. If we were to hold that he could not sue, we should be converting the section into a mere nullity, and the order that the Creditor should not receive the debt into a command to be disobeyed at pleasure. The Act of Limitation of suits enacts, that no act for recovery of immovable property shall be maintained unless the same is instituted within the period of twelve years from the time when the cause of action arose. The Act not only bars the real Owner of his remedy, but it confers a title on the opposite party. So, in the present case, it appears to me that sections 259 and 260 confer a title upon the certified Purchaser, which entitles him to maintain a suit against any one who unlawfully dispossesses him, and that a dispossession of the *Benamedar* by the person who purchased *benamee* in his name, and who is precluded by sect. 260 from maintaining a suit against him to recover the purchased property, would be an unlaw-

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ful dispossession. If a person who has gained a title by limitation waives that title in favour of the real Owner, and gives up possession to him as the rightful Owner, such act would probably be held to amount to a waiver of the right which he had gained by limitation, and to confer it upon the real Owner. In like manner, if a *Benameedar* should acknowledge the purchase to have been made *benamee*, and waive the right conferred upon him by sections 259 and 260, and give up possession to the real Purchaser as the rightful Owner, such act would probably amount to a transfer of the title as well as of the possession to the real Purchaser. In the case of *Gunga Gobind v. Gobind Narain*, which is printed in the paper-Book, and was tried on the 7th July, 1863, before Mr. Justice Jackson and Mr. Justice Roberts, the suit was brought by the real Purchaser, not against the certified Purchaser, but against a person to whom the certified Purchaser had conveyed the property *benamee* for the real Purchaser. *Gobind Narain*, the Defendant, to whom the certified Purchaser had conveyed the estate, allowed the real Purchaser to remain in possession nearly twelve years, and subsequently turned him out. The case was, therefore, in effect one simply between a person for whose benefit an estate had been conveyed to another *benamee*, who after many years' possession by the person for whom he held had wrongfully dispossessed him. In the case of *Koonj Beharree Lall v. Sheikh Khyrath Ali* and others, special appeals Nos. 231 and 232 of 1864, heard on the 19th August, 1864, before Justices Trevor and Glover, the Plaintiff sued to recover possession upon the ground, that the Defendants were Mortgagees, and that after the expiry of the Mort-



gage they had dispossessed the Plaintiff of the property covered by the mortgage and other property held by him *khas*. The Defendants set up, that they had purchased at sales for arrears of revenue in the name of the Plaintiff, and had been in possession since as Proprietors. The Court said, if the Defendants' allegation be true, the plaintiff is out of Court, and they remanded the case for trial as to which of the allegations was true. It must be remarked, that the allegation of the Defendants was that they, ever since the purchase in the name of the Plaintiff, had been in possession as Proprietors. The Defendants' allegation was sufficient to enable them to prove, that notwithstanding the estate had been purchased in the name of the Plaintiff, he had waived his right and made over the property to the Defendants as Proprietors. The case, *Sheetanath Ghose v. Madhub Narain Roy*, special appeal, No. 2,090 of 1864 (1. W. R., 329), before Justices *Kemp* and *Glover*, turned upon the ground, that the *benamee* purchase by the judgment-Debtor in the name of a third party was fraudulent as against the Creditors of the real Purchaser. The case was not one between the *Benameedar* and the actual Purchaser. In the case out of which the question arose, the purchase was of the right of Mortgagor to redeem. I purposely abstain from using the words 'equity of redemption.' The Purchaser could not under that purchase obtain anything more than the symbolical possession of the right which he purchased. The possession of the Mortgagee and of his representatives was merely the possession of the land and of the rents thereof, and of the right of the Mortgagor. The suit is, in effect, to enforce the right of the Mortgagor and to redeem the mortgage, and if the suit cannot be maintained

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on the ground that the purchase was *benamee* for the Mortgagee, the provisions of sections 259, 260, and 264 would be nugatory. If the real Purchaser is for wise purposes precluded, as in my opinion he is, by section 260, from recovering the property purchased, from the *Benameedar*, if the latter is put into actual possession, there can be no reason why the law should allow the real Purchaser by some device to obtain actual possession and leave the certified Purchaser to content himself with the symbolical possession in cases in which any symbolical possession can be given, or, in other words, to leave him a mere shadow instead of the substance. The case is sent back to the Court which referred it."

Mr. Justice *Jackson's* judgment was in these terms :—" In this case I have the misfortune to differ from his Lordship, the Chief Justice, and from my other Colleagues ; but I apprehend, that the doubts expressed by the two learned Judges who have referred this case to the full Bench, fully justify me in stating the opinion I have formed, if indeed the importance and the nature of the case did not make it imperative on me to express the opinion I have formed, although I have the misfortune to be alone in holding that opinion." The learned Judge then stated the question as referred for the opinion of the full Bench, and proceeded : " This question, I may observe, in the form in which it is put, does not appear to me to raise the whole of the issues involved in the present case. It might be answered generally as if the Defendant in possession was not a Mortgagee in possession, but had got otherwise into possession. I will not, however, shrink from the true import of the question, and I will only



observe that, although it refers specially to sect. 260, of Act, No. VIII. of 1859, yet from the course the argument has taken, it has been contended on behalf of the Plaintiffs that the Defendant is out of Court, rather under the provisions of all the sections from 259 to 269, than under the section 260 alone. I understand the Plaintiff, as the case has been put for him, to rely on the express title he has acquired under section 259, and the symbolical possession which he has obtained under the subsequent sections, rather than on the *quasi* penal terms of section 260. There has been some discussion as to the character of section 260, Mr. *Allan* contending, that it was of a remedial nature. I confess, if any rule of construction is to be resorted to other than that founded on the very words of the Legislature, I should be inclined to treat the section rather of a penal than a remedial nature, and, therefore, one not to be construed over-strictly against the Defendant. I understand that from the fusion of law and equity which characterises the proceedings in our Civil Courts, the proceedings possess such a character of elasticity as to enable them to deal with all the rights and equities which arise in a suit. I, therefore, apprehend that every circumstance, and every plea, must be fully considered in order to do justice, unless the cognizance of any particular plea, and any particular circumstances, is expressly barred by legislative enactment. I would ask, is there anything in the case set up by the Defendant, before us, which would prevent the Court entertaining it in answer to the Plaintiff's case? I may possibly be told in answer that there is an imputation of fraud arising from the mere mention of the word '*benamee*.' I humbly

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think, that a fallacy lurks in the supposition, that fraud necessarily attaches to the use of that word. The conditions of society in this Country, and the habits and feelings of Natives here, are so different from those of the people of European Countries, that I think, we ought to guard ourselves against imputing motives of fraud to what we find prevalent here, simply because it is not usual or recognized among ourselves. My own belief is, that the *benamee* system is not essentially one of fraud. I believe, that *benamee* arrangements are constantly resorted to by persons perfectly honest, perfectly solvent, and far from every expectation of insolvency. No doubt serious frauds are frequently carried out by the use of the *benamee* system. It may possibly be, that the Legislature at some future time or other, finding that frauds are perpetrated under that system of a serious character, may absolutely forbid *benamee* transactions; and when the legislature have so directed, the Courts will be bound to act accordingly. Up to this time the Legislature have not attached the taint of fraud to *benamee* transactions. I think that there is, *à priori*, nothing to hinder us from inquiring into and dealing with the case set up by the Defendant. Of course the question remains, whether that case can be supported under sections 259 to 269. It appears to me, on reading the whole of those sections together, that sect. 260 seems to be, and is, out of place. It is a portion of substantive law inserted among various provisions of pure procedure. I have no knowledge of the secret history of the framing of this Code, nor have I the means of ascertaining what took place in the Council Chamber when the Bill was in Committee; but looking to the near



neighbourhood of Acts, No. VIII. and XI., of 1859, in the Statute Book, and the circumstance, that the two Acts were at the same time under consideration, it may have occurred to some one concerned in the framing of the Code that it was very desirable to introduce this section in Act, No. VIII. from the Sale law, where it had stood for many years previously. I am confirmed in this view by the fact, that no such provision appears in the Code of Procedure prepared by Her Majesty's Commissioners. See their 1st Report (1856) CLXXXIX. Now, it appears to me, that the provision corresponding with this section in the Sale law, viz., sect. 36, of Act, No. XI. of 1859, is very much in its place. It was enacted for a reason which is very well known, and taken in combination with the other provisions of the Sale law, it affords ample security to Purchasers. Under Act, No. XI. of 1859, the thing sold is the land, and by sect. 29 the Collector is directed to 'order delivery of possession of the estate or share purchased, to be made by removing any person who may refuse to vacate the same,' and following that, sect. 36 says :—'Any suit brought to oust the certified Purchaser as aforesaid on the ground that the purchaser was made on behalf of another person, not the certified Purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified Purchaser was used, shall be dismissed with costs.' Therefore, the value of sect. 36, taken in connection with sect. 29, is apparent. The Purchaser buys the land and is put into actual possession by the Collector, and any suit to oust him on the ground of *benamee*, will be dismissed with costs.

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Now, it appears to me, that there has been a not altogether successful attempt to engraft that provision of the Sale law upon Act, No. VIII. of 1859, because as the things sold under that Act are of many kinds and scarcely in a case actual land, but only the right, title, and interest of the Defendant, the words 'suit to oust the Purchaser' would be inappropriate, therefore, the words used are 'any suit brought against the certified Purchaser on the ground, that the purchase was made on behalf of another person not the certified Purchaser, though by agreement the name of the certified Purchaser was used shall be dismissed with costs.' I have endeavoured in vain to bring myself to place on those words any construction more extended than those which they naturally bear, viz.:—that any person who may have entrusted or authorized another to buy property for him at an execution sale not using his own name but that of the person employed shall not succeed in a suit against the *furzee*, to recover possession of the thing purchased; but that his suit will be dismissed with costs, and, therefore, in any case to which that provision distinctly applies, it must be put in force without qualification of any kind, and such a suit must be dismissed, but except in a case of this kind, I would in reading the Code put the section altogether aside. It contains two lines which are superfluous except as introductory of the rule taken from the Sale law. They are 'the certificate shall state the name of the person who at the time of sale is declared to be the actual Purchaser.' These words have no signification whatever apart from the provisions which follow; because when, under sect. 259, the Court grants a certificate to the



person who may have been declared the Purchaser at the sale, to the effect, that he has purchased the right, title, and interest of the Defendant in the property sold, he has already done what is further directed in sect. 260, for he has necessarily stated the name of the person who is the actual Purchaser. But now the declared Purchaser becomes the certified Purchaser, and this is the term used in the Sale Act, sect. 36. If sect. 260, be put out of the way as referring only to the class of suits expressly mentioned therein—Is there anything in the other sections relied upon, viz., sect., 259, and sect. 261 to sect. 269, which will prevent the Defendant being heard in this case? I confess I do not see anything. It appears to me, that a *benamee* purchase in this Country when the facts are proved, simply means that a particular thing has been purchased by a certain person with his money and for his own benefit, but that the name of another has been used. There is nothing in the nature of a trust or any other idea but what I have stated. It seems to me that a *benamee* purchase might be effected in the name, neither of the actual Purchaser nor of the Agent, but in a fictitious name, and that on proof of the facts the actual Purchaser would be entitled to all the benefits of his purchase, and protected in it as much as if he had bought in his own name. Is there anything to prevent the possession given by the Court under sects. 261 to 267, which has been given ostensibly to the *furzee*, from being dealt with as a possession given to the real Purchaser in that name; and when we find that possession has gone to the alleged real Purchaser, and not to be *furzee*, I think this must be held to the case, viz.:—that the real

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Purchaser has got the possession though he has taken in the name of *furzee*. In the present case, there is no doubt some complication; because the Defendant, who is alleged to be the real Purchaser, was in possession of the land as Mortgagee, and I am not certain what the state of the facts may be, but it was and possibly may now be uncertain, whether his possession, since the purchase, was what of Mortgagee or Purchaser; and that, perhaps, may be an issue to be tried. But I take it, if the Defendant can make out that the purchase was made by his directions for his benefit, with his money, and that he has since held without question proprietary possession, he will be entitled to retain that possession, although in making out the certificate of purchase the name of the Plaintiff may have been used instead of the Defendant. I cannot shut my eyes to the fact that if we hold otherwise in this suit and in other suits which may resemble this, we shall be giving the direct assistance of the law and of the Courts to enable a Plaintiff in such cases to perpetrate a shameful fraud. I take it to be quite clear, that it is proved in the opinion of all the Court in this case, that the purchase was effected with the money of the Defendant; that the Plaintiff was at that time his servant, and acting under his instructions; and that in strict equity, as between the Plaintiff and the Defendant, the Plaintiff had not a shadow of right to this property. I think, therefore, that the Defendant is not debarred, either by the terms of sect. 260, or otherwise, from raising the defence which he has raised; that that defence is a just and sufficient one; and that Plaintiff's suit ought to be dismissed with costs" (a).

(a) See 3 Ben. Law Rep. Full Bench, 15.



On the 12th of *November*, 1868, an Order was made by the two Judges who had referred the case to the full Bench (in accordance with the opinion of the majority of such Bench), by which they rejected the application of the Appellant for a review of their previous judgment; and on the same date a formal Decree of the High Court was drawn up, in accordance with such Order.

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From this decree the present appeal was brought.

Mr. *Leith*, and Mr. *W. C. Mazumdar*, for the Appellant.

We submit, that the construction put by the Principal *Sudder Ameen* on section 260 of Act, No. VIII. of 1859, and by Mr. Justice *Jackson*, is the correct one. That Act, is a Code of procedure only, and not one of substantive law; consequently, that section ought to have been construed with reference to procedure only, and not, as the majority of the Judges of the High Court have done, to contravene and override well-established principles of law and equity recognized by the Courts in *India*. The fallacy which pervades the reasoning of the judgment of the Chief Justice, in construing sections 259, 260, and 264, of the Act, which directs a Purchaser to be put into possession, is this, that the Chief Justice entirely overlooked the important fact, that the Appellant was not only in *bonâ fide* legal possession, ostensibly as usufructory Mortgagee, but also virtually as Proprietor under his purchase *benamee* by the first Respondent, and could not have been dispossessed by summary process or execution under the above sections of the Act by the first Respondent, who to obtain possession, must have brought a suit and proved a preferable title to the Appellant. Section 260



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of the Act is in its nature a penal enactment, and must, therefore, be strictly construed, *Shah Mukhun Lall v. Baboo Sree Kishen Singh* (a); but it is to be observed, that the Act, No. VIII. of 1859, only requires the Court to dismiss any suit "brought against" the certified Purchaser, which enactment cannot apply to the present suit, as here, the certified Purchaser sues. Neither in that section, nor in any other part of the Act, is it declared or enacted, that an agreement to purchase *benamee* in the name of another shall be considered *per se* illegal, or null and void. Nor has it been declared that in any suit brought by a certified Purchaser, being only the *benamee* or nominal Purchase (as the Respondent in this case has been held by the Courts below to be), against the actual Purchaser in *bonâ fide* legal possession, the Defendant shall be debarred from exercising his undoubted right, under general principles of law, equity, and good conscience, to set up and prove as a defence his title as the actual Purchaser. It is established by numerous decisions of the Courts in India, *Mussamut Shorosutty Dasse v. Gopeesoondary Dasse* (b); *Mirza Khyrut Ali v. Mirza Syafallah Khan* (c); *Sheetanath Ghose v. Madhub Narain Roy* (d); and *Jadub Ram Deb v. Ramlochun Muduck* (e); *Mussumat Chundermonee Dabea v. Watson* (f); *Mahomed Hafiz v. Moulvee Abdool Ali* (g); *Amanee Tewarree v. Rai Rughoo Buns Suhai* (h); and by this Tribunal in *Gopeekrist Gosain v. Gungapersaud Gosain* (i), that a *benamee*

(a) 12 Moore's Ind. App. Cases, 188.

(b) Marshall's Ben. App. Reps., 423.

(c) 8 W. R., 130.

(d) 1 W. R., 329.

(e) 5 W. R., 56.

(f) Sud. Dec. 1858, p. 1733

(g) Sud. Dec. 1859, p. 287.

(h) 3 Ben. Sud. Dew. Reps. 363.

(i) 6 Moore's Ind. App. Cases, 53.



purchase is not *malum in se*, but on the contrary is customary and legal, and that the person actually paying the purchase money is to be considered and treated as the beneficial Owner of the property though purchased in the name of another.

Mr. *Doyne*, for the Respondents.

Assuming, that the finding of the Principal *Sudder Ameen* as to the purchase having been in fact a purchase for *Brij Lall Opadhia*, is correct, as contended by the Appellant, yet the intention of the Legislature in framing the 259th and 260th sections of the Civil Procedure Code, which is framed upon and is similar to the 36th section of the Revenue Sale law Act, No. XI. of 1859, was to prevent the fraud and confusion which arose from the practice of purchasing *benamee* at sales, and as the enactments are positive, that a Purchaser cannot be sued as having purchased *benamee*, it is clear, that a certified Purchaser's title cannot be challenged on that ground, if he sues for possession. Mr. Justice *Jackson* was wrong in laying down in his judgment (a), that the Legislature had not forbidden *benamee* purchases, so far at least as sales in execution of Decrees were concerned. He also was incorrect in holding that sect. 36, of Act, No. XI. of 1859, did not apply, *Jadub Ram Deb v. Ram Lochun Muduck* (b). Section 259 of Act, No. VIII. of 1859, declares in express terms, that the certificate shall be taken and deemed to be a valid transfer of the Defendant, and, therefore, to admit evidence to show that such right and title did not in fact pass to the Purchaser, could set aside the certificate and letter and spirit of that section. As pointed out in the judgment of the Chief Justice, if

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(a) *Ante*, p. 512.

(b) 5 W. R., 56.



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such evidence were admissible, effect could not be given to the express provisions of sections 261 and 263; inasmuch as the person really entitled would be as much justified in coming forward at an earlier stage, and pending the proceedings in execution to call on the Court to give possession to him, and not to the certified Purchaser on the Objector showing that he had in fact found the money for the purchase. Another point is, whether under sect. 264, the *Ryots*, might refuse to pay the rents to the certified Purchaser, alleging that the payment ought to be the *benamee* Purchaser. If such a construction was admitted, contrary to the letter and spirit of the Act, the certified Purchaser could not sue them for rent.

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Their Lordships reserved judgment, which was now delivered by

The Right Hon. Sir MONTAGUE SMITH:—

The facts which raise the question for decision in this appeal may be very shortly stated.

*Brij Lall Opadhia* was Mortgagee in possession of *Talook Doondhur*. Whilst he was so in possession the interest of the Mortgagor was offered for sale under a Decree obtained against him by a Creditor. *Lalla Buhooree Lall* became the ostensible Purchaser at such sale, and the certificate of sale was granted to him in his own name as the Purchaser.

*Brij Lall Opadhia* remained in possession until his death, and after it this suit was brought by *Lalla Buhooree Lall* against his heir (the present Appellant) for the redemption of the *Talook* and possession of it; alleging that the mortgage debt had been paid off by the receipt of the profits, and, if not, that he was ready to pay what might remain due.



The defence was that the purchase was made by *Lalla Buhooree Lall*, in his own name, as a *benamee* Purchaser for *Brij Lall Opadhia*, and with his money; and that the attempt by *Lalla Buhooree Lall* to set up title in himself was a fraud.

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It has been decided by the Courts in *India*, that this defence true in fact, and it was admitted that it must be so treated in dealing with the question to be decided in the present appeal, which is, whether, having reference to certain sections of the Code of Procedure, the defence can in law be made available.

The point upon the construction of the Code is one of considerable difficulty, and was felt to be so by the Courts in *India*. The Principal *Sudder Ameen* decided in favour of the principal Defendant (the Appellant). His decision was reversed by a Division Bench of the High Court. However, the same Division Bench, in consequence of the doubts they entertained, upon a second hearing, referred the point by a short memorandum to the full Bench, who gave judgment for the Respondents; Mr. Justice *Jackson* dissenting from the decision.

It must be observed at the outset, that the suit to be dealt with is one in which the Plaintiffs (the present respondents) seek to establish a right against the principal Defendant (the Appellant), and that they invoke the aid of the Court to give effect against equity and good conscience to a claim founded upon fraud.

It must be conceded, that it is only by force of positive statutory law that it can be obligatory upon the Courts to give their active assistance in such a case to the fraudulent Plaintiffs against the defrauded Defendants. But it is said that this obligation is found in the Code of Civil Procedure.



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It is well known, that *benamee* purchases are common in *India*, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal ; and, therefore, they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course.

The enactments relied on by the Plaintiffs are found in a Code professing to deal, not with rights, but with remedies, and procedure to enforce rights.

The preamble states the object of the Code to be "to simplify the procedure of the Courts of Civil Judicature." It is right to bear this object in mind in construing the sections on which the Plaintiffs rely.

The only express enactment on the subject occurs in section 260. That section, after directing that the certificate shall state the name of the person who is declared at the sale to be the actual Purchaser, says this—"And any suit brought against the certified Purchaser on the ground that the purchase was made on behalf of another person, not the certified Purchaser, though by agreement the name of the Purchaser, was used, shall be dismissed with costs."

This enactment is clear and definite ; there is nothing from which it can be inferred, that more is meant than is expressed. It is confined to a suit brought against the certified Purchaser, and to a specific direction as to what shall be done with that suit, viz. :—that it shall be dismissed with costs.

The present suit, which is the converse of that pointed at in the section, is not within the words or scope of it, and if dealt with in the manner directed, would, of course, come to a disastrous end.



It has, however, been contended, in support of the opinion of the majority of the Judges of the High Court, that there may be inferred from this section, taken in connection with section 259, and the sections relating to the manner of giving possession, a general intention, having for its object to prevent any inquiry between the Purchaser *de facto* and the person for whom he is alleged to have purchased, upon the question, whether the purchase was *benamee* or not, and that effect should be given to that general intention.

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Their Lordships consider it would not be safe to make such an inference, except it arose upon very clear implication, and that it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments, which would exclude an inquiry into the truth in any suit between the parties; when the express enactment is narrowed and confined to a specific direction as to what shall be done in a particular suit, which is described and defined in precise terms. And it appears to their Lordships, that effect can reasonably be given to the provisions of the Code without making such implication.

Section 259, requiring the Court to grant a certificate to the person declared to be the Purchaser of land at the Sale, and directing that such certificate shall be taken and deemed to be a valid transfer of the Debtor's right and interest, does no more than create statutory evidence of the transfer, in place of the old mode of transfer by Bill of sale. Their Lordships consider, that no inference fairly arises from this clause, that it was intended to interfere with *benamee* transactions; for the language is adapted to meet



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the Case of ordinary Purchasers, and the same language might well have been used if *bemamee* transactions had been wholly unknown.

The same observations apply to sections 261 to 266, which prescribe modes of giving possession of the various kinds of property. These provisions would naturally find a place in the Act in order to govern ordinary purchases, and no inference can, therefore, be drawn from them of an intention to prohibit *benamee* transactions.

It is evident from this analysis of the sections of the Code, that the inference sought to be made against *benamee* transactions rests entirely on the 260th clause, and that, if this clause were absent from the Code, there is absolutely nothing in the other sections from which such an inference could be drawn.

It was strongly pressed upon their Lordships that as, by the express terms of the 260th section, a suit brought against a Purchaser on the ground, that the purchase was *benamee* must be dismissed, that it would, in many cases, lead to inconsistency, if that ground could be set up as a defence against a suit brought by a *Benameedar*.

If this really were so, it would result from the attempt to deal with the subject of *benamee* in a partial manner; and even in that case their Lordships would consider it fitting that the Legislature should declare its view, and supply a remedy rather than that the Courts should strain the existing Act. But it will probably be found, that the suggested inconsistencies will not be great, and even if the Respondents' view were adopted, they would not be wholly avoided.



The object which the framers of the Code probably had in view was, to prevent judgment-Debtors becoming secret Purchasers at the judicial sales of their property, and to empower the Court selling under a Decree to give effect to its own sale, without contention on the ground of *benamee* purchase, by placing the ostensible Purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of *benamee* shall be dismissed.

In the cases where actual possession can be given of the thing sold by the Court, no difficulty can arise; for there the certified Purchaser, having both the certificate and possession, can hold the property by virtue of clause 260, against any suit brought against him; and if that possession should be interfered with, either by force or fraud, on the part of any person, even a *benamee* claimant, it no doubt ought, without inquiry as to the *benamee* claim, to be restored.

It has been suggested, that difficulties may arise in the case of possession given, under sect. 264, of lands in the occupancy of *Ryots* to a certified Purchaser, who had bought *benamee* for the judgment-Debtor, to whom the *Ryots* may have been afterwards induced to pay their rents. It was said that, upon the strict construction of the Code, the Purchaser might be precluded from suing the *Ryots* for these rents. It is not necessary to decide these questions, but their Lordships do not consider this to be a necessary consequence of the construction; for, as regards the *Ryots*, the certified Purchaser, when put into possession, becomes their Landlord, both by title and possession, and it may well be that

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they should not be allowed to set up the *benamee* right of another against the person to whom they had thus become tenants.

So, in the case where debts due to the judgment-Debtor have been sold and delivered to the certified Purchaser, the Debtors may well be prevented from setting up the *benamee* title of a third person in actions brought by the holder of the certificate of sale, for they are by sect. 265 prohibited from paying to any one except the certified Purchaser, and they could not, therefore, set up title in another. Besides, when suing them, the certified Purchaser is only reducing into possession the very thing he purchased.

In fact, the instances would probably be very few where any difficulty would arise. It would occur only in cases like the present, where the certified Purchaser, who is really a *Benameedar*, having been put into complete possession by the Court of the thing purchased at the judicial sale, attempts to bring a new suit against the real Purchaser, not to complete the title, or even the possession to the thing purchased, but to enforce a right attaching to it. In this case, the Purchaser has full possession of the thing he bought, so far as the selling Court can give it, and it cannot be taken from him; but when he seeks, as Mortgagor, in a suit altogether new, to redeem against the Mortgagee in possession under his mortgage title, then the express enactment contains no words to restrain the defence set up.

But difficulties would also arise from giving a wide construction to the Code, beyond the ordinary meaning of the words. It was declared by the High Court, in conformity with former decisions, that where



the real Owner has been permitted to have or retain possession by the ostensible Purchaser, the latter cannot insist on his certified title to recover. Now, if the Code is to be read as wholly prohibitory of *benamee* judicial purchases, thus rendering them illegal, the defence in such cases ought to be disallowed; for if allowed to be set up, then effect must necessarily be given to that which, upon the hypothesis, is prohibited and illegal. The mere permission to hold possession cannot alone give or transfer a title from the *Benameedar* to the real Owner. The title must depend upon the purchase having been made *benamee*, and if that be unlawful, then it ought not to be allowed to prevail in the cases in which the High Court agree that it should do so.

The authorities, therefore, which have held that, in the cases just referred to, the real Owner may set up his *benamee* right against the *Benameedar*, necessarily involve the opinion, that the Code has not made *benamee* purchases unlawful; and if that is so, there seems to be no sufficient reason for giving the provisions of the Code, in cases like the present, a larger operation than the language imports.

The High Court, in their judgment in this case, approve of the above authorities; but they say they may be explained on the ground that the *Benameedar* has, by consenting to the possession of the real Owner, waived his right to the benefit given to him by the Code; but the Code had certainly not for its object the desire to confer a benefit on fraudulent *Benameedars*. Its provisions must have been framed on grounds of public policy, to which the doctrine of waiver is not properly applicable. That policy, if it

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was meant to be carried to the extent of making such transactions unlawful, might have been so declared and enacted, but the Code stops short of such an enactment. Their Lordships consider, that where the Legislature has stopped, the Courts must stop.

It was said that the certified Purchaser in a case like the present, would have the shadow only, and not the substance of the thing he bought, but this is exactly what in equity and good conscience he ought to have, if no positive law intervened. The question is, whether such positive law does intervene in this case.

For the reasons given, their Lordships do not feel justified in adopting a construction beyond what the language of the Code imports, when such a construction would, in effect, be to declare that to be unlawful which the Code itself has not declared to be so; and they are consequently of opinion, that there is no bar to preclude the inquiry in this suit, into the real title.

Their Lordships find that a cross appeal to Her Majesty in Council against the decision of the Courts below on the question of fact is pending. Without prejudice to such cross appeal, and to any Order to be made thereon, in case the same should be prosecuted, their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the Decrees appealed from, and in lieu thereof to order that the appeal to the High Court from the Decree of the Principal *Sudder Ameen* be dismissed with costs. The Appellant will have the costs of this appeal.



SARODA PROSAUD MULICK ... Appellant ;

AND

LUCHMEEPUT SING DOOGUR, DHUN-  
PUT SING DOOGUR, and JO- } Respondents.\*  
DOONATH SANNYAL ... }

*On appeal from the High Court of Judicature at Fort William, in Bengal.*

THIS appeal was brought from a Decree of a Division Bench of the High Court, which reversed the Decree of the Principal *Sudder Ameen* of *Dinagapore*, and dismissed the suit which had been

26th & 27th  
Jan., 1872.

Exposition  
of the prin-  
ciples and  
practice pro-  
vided by the  
Code of Civil  
Procedure,  
Act, No. VIII.  
of 1859, in  
the execution  
of Decrees

° Present :—Members of the *Judicial Committee* :—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

by attachment and sale of property within, as well as without, the jurisdiction of the Court by which the Decree is passed.

Decree against *A.* in the *Zillah* Court of *E. B.* In consequence of the property of *A.* in that *Zillah* not realizing on sale the amount of the Decree, the Judge sent a certificate to the Judges of three other *Zillah* Courts *M., H., & D.*, in which other property of *A.* was situate, which had been attached. The proceeds of sale of the property in *Zillah H.* were also insufficient, and in *Zillah D.* the property of *A.* was sold to the Manager of the Decree-holder, a Lunatic, who was ordered to find security for the proceeds of the sale before possession. Pending the completion of the security, another Decree-holder against *A.* obtained an attachment of *A.*'s property in *Zillah D.*, and sold the property of *A.* brought for the first Decree-holder, and the Court awarded possession to the second Purchaser. In a suit on behalf of the first Decree-holder for possession under the first sale, Held,

First, that under the provisions of sects. 248 to 272 in the case of immovable property, the process of attachment and the Order for sale may be distinct and separate, and there may be a complete execution of a Decree under an attachment without any Order of sale.

Secondly, that there was no irregularity in the Judge of *Zillah E. B.*



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instituted by *Mooktakashee Dabee*, the then Manager of the estate of *Sreenath Sannyal*, a Lunatic, now represented by the Appellant as Manager.

*Mooktakashee Dabee*, the Wife of the Lunatic, and the Respondents were Purchasers at sales in execution of their respective Decrees of the right, title, and interest of the Respondent, *Jodoonath Sannyal*, in the lands situate in *Zillah Dinagepore*, which were the subject of the suit. The purchase of *Mooktakashee Dabee* by priority of the date was not disputed, and the question which arose in the suit was, whether that purchase was a nullity under the provisions of the Civil Procedure Code Act, No. VIII. of 1859, sects. 235, 240, 256, 284, 285, 286, 287, & 288 (a). The Principal *Sudder Ameen* (Mr. S. Wright) held that the sale was valid. On appeal to the High Court, a Division Bench composed of the Justices *Kemp* and *Jackson* at the first hearing held such sale to be a nullity, but afterwards, on review, the Judges differed in opinion, Mr. Justice *Jackson* being of opinion that the Appellant's purchase was a valid purchase, and Mr. Justice *Kemp*, the Senior Judge, adhering to his former opinion that the sale was a nullity. A Decree was drawn up according to the opinion of the

(a) These sections are referred to in their Lordships' judgment, *post*, pp. 538-40.

transmitting the record to three several *Zillah* Courts at the same time for execution, as the first process of execution, namely, by attachment, could effectually stay the execution sales in *D.* & *H.* until the result of the sale in *M.* was known;

Thirdly, that under the 286th sect. of Act, No. VIII. of 1859, the transmission of the record for execution by the Judge of *Zillah E. B.* could, in the discretion of the Judge, be sent to the Courts *M.*, *H.*, & *D.* concurrently for execution; and

Fourthly, that the delay in lodging the security did not vitiate the sale



Senior Judge, from which Decree the present appeal was preferred.

The facts, so far as is necessary to state them, were these :—

In the year 1862, *Mooktakashee Dabee*, the Wife and Manager of the Lunatic, with the Respondents, *Jodoonath Sannyal* and another, obtained Decrees in the Court of the Principal *Sudder Ameen* of *East Burdwan* for a share in certain *zemindaries*, and a sum of money exceeding two lacs of Rupees. When she sought to execute this Decree, a question was raised under the terms of the Decree as to her right to do so without being appointed Trustee by the Court and giving security. She accordingly applied to the Court which passed the Decree, and tendered security sufficient to cover the value of the lands decreed to her as Manager of her Husband, and stated her intention of tendering further security to cover the sum that might be realized by the execution sale of the properties of the judgment-Debtor, and prayed to be declared Trustee of the lands and to have possession. The Court appointed her Trustee, and directed her to give security for the money that would be realized by the sale of the properties of the Debtor. Execution was accordingly issued, and *Mooktakashee Dabee*, from time to time, sold, under the Decree, properties of the Judgment-holder within the jurisdiction of the *East Burdwan* Court, and became Purchaser at the sales, setting off the purchase-money and giving security prior to taking possession. Having exhausted the effects of the Debtor in *Zillah East Burdwan*, she applied in *March*, 1864, to the Court of the Principal *Sudder Ameen* of

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*East Burdwan*, for a certificate under the 284th and 285th sections of the Civil Procedure Act, for an attachment of the properties of the Debtor in *Zillah, Moorshedabad*, with a view to prevent alienations of other properties in *Zillahs, Hooghly* and *Dinagepore*. The Principal *Sudder Ameen* of *East Burdwan*, after inquiring into the security previously given, granted the certificate required by section 285, which was to the effect that, after realization of the amount of Rs. 2,690, there remained an unsatisfied balance of Rs. 2,33,452, and ordered that a copy of the Decree and certificate of the Court, with specifications of the properties in *Zillahs, Moorshedabad, Hooghly*, and *Dinagepore*, should be sent to the Judges of each of those Districts, directing the Judge of *Moorshedabad* to proceed to attachment and sale of the properties within his jurisdiction, and the Judges of *Hooghly* and *Dinagepore* to attach the specified properties within their respective jurisdiction under section 235. The reason for not directing the sales immediately upon the attachment in the latter Districts, appeared to be that the Principal *Sudder Ameen* of *East Burdwan* desired first to see what would be the result of the sales in *Moorshedabad* before proceeding to sell the other properties of the Debtor. The proceeds of the sale of the *Moorshedabad* property was small. In consequence, *Mook-takashee Dabee* applied again to the *East Burdwan* Court, for the purpose of having the Decree sent to the *Dinagepore* Court, and completing the execution proceedings, and a certificate for sale having been sent, she became a Purchaser under such sale. It further appeared, that the balance



of the security required from her fell short of this last purchase. The Respondents then applied to have the property in *Zillah, Dinagepore* sold in execution of a Decree they had obtained against the same Debtor, *Jodoonath Sannyal*; the same having been attached by them in *August, 1865*, and in *January, 1866*, the right, title, and interest of *Jodoonath Sannyal* in the last-mentioned *Zillah*, was sold to the Respondent and *Mooktakashee Dabee*, and notwithstanding the opposition of the Respondents they were put in possession. *Mooktakashee Dabee* then, as before stated, brought the present suit against the Respondents for possession, which was confined to the property and proceedings in the *Dinagepore Zillah Court*.

The Appellant was, after the institution of the present appeal, substituted, as Manager of the Lunatic estate, for *Mooktakashee Dabee*.

Mr. *Cowie*, and Mr. *Doyne*, for the Appellant.

There was a sufficient compliance with the provisions of sect. 285, and the other sections of the Act, No. VIII. of 1859, relating to the execution of Decrees out of the jurisdiction of the Court by which it was passed. It is nowhere provided in that Act, that an application for attachment in a case like the present should be made direct by the Decree-holder to the Court which is to execute the Decree, and it is a reasonable construction of the Act that such direction should proceed from the Court which transmits the copy of the Decree to a Court in another *Zillah* where the Debtor's property lies, for execution. Even if such were the intention of the Act, such an irregularity would not vitiate the sale. Sect. 256. The property sold does not pass by the certificate of sale alone.

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Sections 256 and 257 of the Act show that the sale is absolute before the grant of the certificate, and that the certificate is but evidence of the sale of the interest of the judgment-Debtor.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Respondents.

The *onus* was on the Plaintiff, and she failed to prove her right as Purchaser to the lands in suit, as by reason of her personal default in giving security, and consequent failure to obtain the statutory certificate by way of conveyance, which by sect. 259 of Act, No. VIII. of 1859, is a valid transfer of the right, title, and interest of the judgment-Debtor, while the title of the Respondents, who are in possession, was established by the statutory certificate conveying to them the lands, as the proceedings under which the sale in execution of the Plaintiff's Decree took place, at which she became the Purchaser of the lands, were invalid from natural vice and the sale null and void. The Attachment of the Debtor's lands in *Dinagepore*, at most, was only by way of injunction or sequestration. Attachment of property by a Court other than that which passed the Decree, vitiates the sale, *Shurutoollah Merdha v. Gooroo Churn Dass* (a). No copy of the Decree in which the certificate issued was sent by the Judge of *East Burdwan* to the Judge of *Dinagepore*.

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The consideration of their Lordships' Judgment was reserved and now delivered by

The Right Hon. Sir MONTAGUE SMITH :—

In this case *Mooktakashee Dabee*, the Manager of the estate of her Husband—a Lunatic—(of which

(a) 8 W. R. Civil Rulings, 310.



the Appellant is now Manager) obtained a Decree in the *Zillah* Court of *East Burdwan* against *Jodoonath Sannyal*, for upwards of two lacs of rupees.

A small sum only having been realized in that *Zillah*, proceedings were taken to obtain execution of the Decree on properties of the Defendant, *Jodoonath Sannyal*, within the jurisdiction of the *Zillah* Courts of *Moorshedabad*, *Hooghly*, and *Dinagepore*. It is with reference to what was done in *Dinagepore*, that the questions arise.

In *March*, 1864, a certificate and other papers were sent by the Judge of *East Burdwan* to the Judge of *Dinagepore*, the terms of which will be hereafter adverted to. Some time afterwards, but the precise date is not given, the Judge of *Dinagepore* attached the lands of the Defendant in his *Zillah*, which form the subject of the suit. On the 24th *June*, 1865, another certificate was sent from the Judge of *Burdwan*, and on the 4th of *September* the lands of the Defendant were sold under the Decree to *Mooktakashee Dabee*, the Decreeholder, and by an Order of the Judge of *Dinagepore*, of the 4th of *December*, 1865, the sale was confirmed, and a writ of possession directed.

It appears that the Judge of *Dinagepore* in pursuance of the Order of the Judge of *Burdwan*, required *Mooktakashee Dabee* to give security for the proceeds of the sale before he would allow actual possession to be given to her. Several months elapsed before she found security, and meanwhile the present Defendants, by Orders of the *Zillah* Judge of *Dinagepore*, obtained attachment and sale of the same lands under a judgment obtained by them against the same Debtor, *Jodoonath Sannyal*; and on the 6th

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January, 1866, the lands were sold in execution of their Decree, and purchased by themselves, and possession afterwards given to them.

*Mooktakashee Dabee* then brought this suit against the present Defendants (the Respondents), asserting her title under the first judgment sale. It is conceded that her title must prevail, unless the sale under her execution can be invalidated.

The ground on which the *Zillah* Judge directed the giving of possession under the second sale to the Respondent was, that *Mooktakashee Dabee* having failed to give security, the sale to her became null. It is plain that this ground is utterly untenable. The security was ordered for the protection of the Lunatic Plaintiff against misappropriation by his Manager. It was not a proceeding affecting the judgment-Debtor, and was entirely collateral to the course of the suit between the Judgment-Creditor and judgment-Debtor. The omission to give this security could not in any way affect the title which had vested in the Plaintiff by the previous sale. This decision of the *Zillah* Judge had the effect of causing the omission by the Lunatic's Manager to do an act intended to secure the fruits of his judgment to him, to operate so as to deprive him altogether of them, and hand them over to the second judgment-Creditor. It is much to be lamented that such a misconception should have taken place.

Their Lordships also consider, that the *Zillah* Judge was in error in granting the Order for the second sale under the Respondent's attachment, and confirming the purchase by him, when the sale of the same lands had already taken place under *Mooktakashee Dabee's* attachment, and the purchase



by her under that sale had been confirmed and had not been set aside. Their Lordships cannot find that this course was in accordance with the Code of Procedure. The title had vested in *Mooktakashee Dabee* by the sale under her attachment, and until it was set aside there was nothing upon which the second sale could operate. This course inevitably created a conflict between the two Decree-holders who became Purchasers at the judicial sales, under their respective attachments, and led to the erroneous Order of the 19th of June, 1866, which ordered the possession to be given to the Respondent. Such a course also is in any case clearly contrary to the interests of Debtors as well as Creditors, as it is obvious that when property is offered at a second sale, with the cloud cast on the title by the subsisting first sale, it would be likely to go for an inadequate price.

In the present appeal, however, it was contended at their Lordships' Bar, by Sir *Roundell Palmer*, that the proceedings in the Court of *Dinagepore*, which resulted in the sale to the Plaintiff, were without jurisdiction, and that the sale under them was invalid on the ground of "a radical vice" in the proceedings when the matter was first transmitted by the *East Burdwan* Judge to *Dinagepore* in this:—that the lands of the judgment-Debtor were ordered to be attached, not as the first step in an execution which might terminate in a sale, but by way of sequestration or injunction only, and, therefore, that the proceedings were not an execution or a step in it within the meaning of the Civil Procedure Code.

It is plain, however, on reference to the Code,

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that property may be attached without view to immediate sale. The group of clauses, sections 232 to 245, under the heading "Of the execution of Decrees for money by attachment of property," prescribe the manner of attaching the various kinds of property and dealing with them when attached. Section 243 shows how debts and immovable property are dealt with, and provides modes of satisfying the Decree by them, without sale. Another group of sections, 248 to 272, headed "Of sales in execution of Decrees," provide the procedure in case it becomes necessary to sell.

It is obvious from these sections that, in the case of lands, the process of attachment, and the order for sale may be distinct and separate, and that there may be a complete execution of a Decree under an attachment without any order for sale.

That procedure is provided for the execution of Decrees out of the jurisdiction of the Court in which they are made. Section 284 and following clauses empower the Judge on application unless there be any sufficient reason to the contrary, to transmit a copy of the Decree with a certificate that satisfaction of it has not been obtained in his jurisdiction, and a copy of any Order for execution of such Decree that may have been passed, "to any Court to which the applicant may wish the Decree to be executed." The Court to which they are sent is to file them, and section 287 enacts, that the copy of any Decree, or of any Order of execution, when filed in the Court to which it has been transmitted for execution, shall for such purpose have the same effect as a Decree or order for execution made by such Court.

The certificate or Order of the Judge of *Burdwan*



of the 19th of *March*, 1864, sent to the Judge of *Dinagepore*, contains, in substance, a recital or statement of the Decree of the *East Burdwan* Court, the amount recovered by execution, the balance due, and that the Decree-holder have given a list of properties in *Zillahs*, *Moorshedabad*, *Hooghly*, and *Dinagepore*, and then declares that "a certificate, &c., are sent" to *Moorshedabad*, under sections 284 and 285, requesting that properties in that District may be attached and brought to sale, and that certificates, &c., be sent, under section 235, for attachment, with a view to prevent alienations of properties, in *Zillahs*, *Hooghly* and *Dinagepore*. It ends thus, "afterwards, when proceedings for attachment and sale of the properties in *Zillah Moorshedabad* shall have been completed, the proper order will be passed on the Decree-holder's application."

The objection was, in effect, that this Order treated the attachment directed to be made in *Dinagepore* as an injunction or sequestration only. Their Lordships, however, think that this was not so, but that it was meant that the attachment should be a proceeding in execution of the Decree. The proceeding was, on the face of it, declared to be a direction to attach under section 235; and that section only authorizes the attachment as a step in execution. No doubt, every attachment involves an injunction, which is indeed one of its necessary effects. But when an act of a Court can be so construed as to have an operation consistently with law, it would be contrary to ordinary rules of construction to attach to it another signification which would altogether destroy its effect. Their Lordships, therefore, consider that what the Court intended to do was to

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transmit the proceedings to the three *Zillahs* for execution, with a direction that the first process of execution, viz., by attachment, should take place in all, but that further proceedings under the attachments should not be taken in *Hooghly* and *Dinagore* until the result of the completed execution in *Moorshedabad* was known.

It has been already pointed out that the procedure of the Code contemplates, in the case of lands, the issuing of separate Orders, subsequent to the attachment, for the sale or other disposition of them.

A more important point involved in the case is whether the transmission could be made to the three *Zillah* Courts concurrently, for the purpose of execution. On consideration of the Code their Lordships can find nothing to prevent this being done. On the contrary, the procedure is well adapted to allow of it, and of its being done most beneficially for the Creditor, and without injustice to the Debtor. If it were not so, the Debtor might be able to get rid of his property before it could be attached. On the other hand, there is provision for the protection of the Debtor, for the issuing of the execution in more *Zillahs* than one is made subject to the control of the Judge, who may refuse to do so, where "he saw there was any sufficient reason to the contrary" (section 286). Again, after the attachments have been granted, if there should be any ground of complaint, the Debtor and any parties interested may apply, under the provisions of the Code, to remove or stay proceedings under them.

It would, no doubt, in many cases, be a right exercise of the discretion of the Court not to act on the power, and to refuse to send a Decree for con-



current execution into several places; and when it did act on it, it would be, in many cases, proper to impose terms on Decree-holders, that they should not proceed to sale under all the attachments at once.

This is really what was meant to be done here, although it was not done in a very good and satisfactory form.

The case is thus reduced to the objection, that a copy of the Decree was not transmitted to *Dinagapore*.

The High Court rest their first judgment on the ground that no copy of the Decree or of the certificate, that satisfaction had not been obtained, was sent. The latter document clearly was sent. In the judgment on review, Mr. Justice *Jackson* came to the conclusion that both were transmitted. Mr. Justice *Kemp* alone retained his former view.

Assuming that if no copy of the Decree was sent, the attachment made at *Dinagapore* would be without valid authority, which their Lordships do not find it necessary to determine, it lies on the Defendant to prove that it was not transmitted. The Judge at *Dinagapore* acted on the certificate by attaching the lands, and afterwards sold under that attachment. The maxim, therefore, *omnia præsumuntur rite esse acta*, must prevail until the contrary is shown. It certainly is not shown by the document of the 19th of *March*, 1864, for it is there stated that "Certificates, &c.," were sent; nor by the Memorandum of the attachment which refers to the *rookabaree* "and other papers" having arrived. On the contrary, it may be presumed from them that all necessary documents were transmitted. It is said, that it must be inferred from the Order which preceded the document of

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the 19th of *March*, that it was not intended to send the copy of the Decree to *Dinagepore*. This, perhaps, may be inferred from that document taken alone, but it would not be safe to act on such an inference to annul the attachment and sale, especially when it is consistent with the language of the subsequent documents, that the copy was sent with the other papers on the 19th of *March*; or, at all events, before the attachment was made.

On the whole, their Lordships consider, that the appeal should be allowed; and will humbly advise Her Majesty that the Decree of the High Court should be reversed, that the Decree of the Principal *Sudder Ameen* should be executed, and that the Appellant should have the costs of the litigation in *India* and of this appeal.

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ANUND LOLL DOSS ... Appellant ;

AND

JULLODHUR SHAW and another ... Respondents.\*

*On appeal from the High Court of Judicature at  
Fort William, Bengal.*

IN this appeal the question was confined to the construction of sections 235, 240, and 271 of the Act, No. VIII. of 1859 (a) ; the point at issue being, whether a sale admitted to be *bonâ fide* by a Debtor after attachment, with the consent of the Creditor and payment by the Debtor out of the proceeds of the sale to such Creditor was null and void under the section 240 as against a Purchaser under a judicial sale of the same property by a subsequent attaching Creditor.

The suit was brought by the Appellant against *Radhamohun Shaw*, deceased, and another, re-

°Present :—Members of the *Judicial Committee* :—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

*Assessor* :—The Right Hon. Sir Lawrence Peel.

(a) See, for these sections, judgment, *post*, p. 549.

ment against the same estate, which was subsisting at the time of the sale by the Debtor, and sold the estate, treating the former sale as null and void :—Held, that the first sale made was valid under sect. 240 of the Act, No. VIII. of 1859, as against the first attaching Judgment creditor, and not affected by the subsequent attachment and sale thereunder by B.

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A., a Mortgagee, obtained under Act, No. VIII. of 1859, an attachment against his Debtor's real estate. Before removal of the attachment or sale by A., the Debtor made a *bonâ fide* sale, for value of the estate so attached, and out of the proceeds satisfied, A's judgment-debt. B., another Judgment-creditor also obtained an attach-



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presented by the Respondents, seeking a declaration of his right to, and a decree for possession of, certain premises, situate in *Shobabazar* Street, in the Town of *Calcutta*.

By the plaint he claimed title to the premises as Purchaser of the right, title, and interest of one *Russick Chunder Soor*, at a Sherriff's sale, dated the 21st of *February*, 1867, under an attachment, dated the 22nd of *November*, 1866, issued by one *Nety Chunder Paul*, and he sought a declaration, that a conveyance of the premises which had been executed in favour of the Defendants, on the 19th of *November*, 1866, by *Russick Chunder Soor*, was null and void, under sect. 240 of Act, No. VIII. of 1859, on the ground of the subsistence, at that date, of a prior attachment of the same premises, and which he contended ought to be considered as still in force, and in the plaint suggested a want of *bonâ fides* on the part of the Defendants, in regard to their conveyance, and the sale on which the same was founded.

The Judge of the High Court, Mr. Justice *Norman*, sitting in its ordinary original civil jurisdiction, decided the case in favour of the Defendants, and dismissed the suit with costs. In his judgment he observed, that the suit was a speculative one, and that the Plaintiff had come into Court on a technical ground, contending that while two attachments, one of the 29th *September* and the other of the 19th *November*, 1866, were still in force, *Russick Chunder Soor*, the judgment-Debtor, had sold his land to the Defendants, and such alienation was void under section 240 of Act, No. VIII. of 1859; and the Judge further observed that, in his original statement, the Plaintiff had never suggested that the



Defendants' purchase was not honest and *bonâ fide*. The Judge then proceeded to consider the point of law raised by the Plaintiff under that section; that although the sale took place on the 19th November, and a mortgage debt, and the then subsisting attachments had all been paid off out of the purchase-money, the Plaintiff had a right to contend, that the sale was null and void. This point of law, after a full consideration, the Judge decided in favour of the Defendants.

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The question respecting the validity of the sale, submitted for the consideration of the High Court, on the Plaintiff's appeal from that judgment was, whether a private *bonâ fide* alienation for value of property attached in the manner pointed out by section 240, of Act, No. VIII. of 1859, was by virtue of that section null and void as against all the world, or only as against the attaching Creditor, or other person or persons who might acquire rights under or through such attachment, or to what other limited extent?

This point was argued before a full Bench, consisting of the Chief Justice, Sir Barnes Peacock, and the Justices Jackson, Macpherson, Markby, and Mitter. Mr. Justice Markby was of opinion, that the alienation was under the 240th section *per se* null and void, but the majority of the Court, the Chief Justice and the three other of the puisne Judges, decided that a private *bonâ fide* alienation of property, attached in execution of a Decree, was null and void only, as against the attaching Creditor, and those who claim through or by him; but not as against any other person who had attached the property.

The Chief Justice, delivering the judgment of the



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Divisional Bench, stated that the sale to the Defendants was completed on the 19th of *November*, 1866, and the conveyance then executed, and that the balance of the purchase-money (the whole amount of which was Rs. 15,312 : 8) was then paid, and that out of the purchase-money, and before the subsequent attachment was put in by *Nety Chunder Paul*, the two former execution or attaching Creditors had been paid the full amount of their Decrees under which attachments had issued. He then adverted to the before-mentioned mortgage, observing that it was proved that *Russick Chunder Soor*, on the 10th of *March*, 1866, had mortgaged the premises to *Parbutty Chunder Soor*, a near relative of his, for the sum of Rs. 7,000 and interest, and that although it was contended in the course of argument the same was fictitious and fraudulent, yet that the point had not been raised on the pleadings, or by the issues, and so was not required to be determined, and the learned Judge proceeded in these terms:—"The Plaintiff originally rested his case upon the single ground that the sale to the Defendants was void under sect. 240 of Act, No. VIII. of 1859, the sale having taken place before the first two attachments were withdrawn. He was afterwards allowed to file a further written statement, in which he charged that the sale and conveyance to the Defendants were collusive and fraudulent, and the first issue was raised, whether Defendants were *bonâ fide* Purchasers for value. The learned Judge of the Court below has found, that issue in favour of the Defendants, and in my opinion he came to a right conclusion upon that point." The Chief Justice further held, that the Plaintiff had merely purchased the rights and interest



of the judgment-Debtor, at the Sheriff's sale, and that the Mortgagee, if the mortgage was a valid one (which he found to be the fact), had a right and interest superior to that of such judgment-Debtor, and that as the mortgage had been paid off by and out of the purchase-money of the Defendants, the Mortgagee's interest vested, in equity, in the latter, and had been subsequently duly conveyed to them; and that, even if the mortgage had been, as contended by the Plaintiff, fraudulent, the Chief Justice also held, that the Defendants were *bonâ fide* Purchasers for value, without notice of such fraud, and were, therefore, entitled to hold the premises purchased, and concluded as follows:—"The main question, however, is, whether the Defendants' purchase was null and void under section 240, of Act No. VIII. of 1859. That question has been determined by a full Bench, and upon that point alone the Defendants are entitled to a decree."

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From this decree the present appeal was brought.

Sir *R. Palmer*, Q.C., and Mr. *Doyne*, for the Appellant.

As an attachment continued at the time of the sale to the Respondents, the sale was, under the terms of the Act, No. VIII. of 1859, sect. 240, according to its natural and literal construction, null and void. To adopt the construction put upon that section by the majority of the Judges of the High Court, would be to depart from the policy of the Act, which was to take from a Debtor, pending an attachment of his property, all right of alienation. Any other construction would open a door to fraudulent and



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collusive devices. Sections 270, 271, & 272 expressly provide for the priorities of several attaching Creditors, showing that the occurrence of a number of attachments had not escaped the attention of the Legislature, when framing the Act, No. VIII. of 1859.

Mr. *Field*, Q.C., and Mr. *Leith*, appeared for the Respondents, but were not called on.

Their Lordships' judgment was pronounced by

The Right Hon. Sir ROBERT COLLIER :—

The facts under which this question arises may be thus shortly stated. *A.* obtains an execution against his Debtor, in the form of an attachment against the Debtor's real property. The Debtor, with the consent of *A.*, makes a private sale of the property, and out of the proceeds satisfies the debt, but no application is made to the Court for the confirmation of the sale or for the removal of the attachment, and the attachment still remains, at all events, formally, in force. Subsequently *B.*, another Creditor, obtains an attachment upon another judgment. He proceeds to a judicial sale, treating the former sale as void; and the question is, whether the Purchaser under the second sale has a good title, and is entitled to say, that the prior sale was to all intents and purposes void as against him?

Their Lordships adopt the view taken by the late Mr. Justice *Norman* in the first instance, and by the majority of the High Court, including the Chief Justice, upon appeal. The question turns mainly upon the interpretation of two sections of Act, No. VIII. of 1859, under the head "Execution of decrees for money by attachment of property," and



in construing these sections it should be borne in mind that we are not dealing with provisions prescribing the mode of administering property amongst Creditors generally, but with provisions prescribing the rights of particular Creditors who have obtained judgments and executions.

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Now, the sections alluded to, are in these terms :  
Section 235, "Where the property shall consist of lands, Houses, or other immovable property, the attachment shall be made by a written Order, prohibiting the Defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise."

Section 240 enacts, "After any attachment shall have been made by actual seizure, or by written Order as aforesaid, and in case of an attachment by written Order after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts or dividends or shares to the Defendant during the continuance of the attachment shall be null and void."

The question is, whether those words, "any private alienation of the property attached, whether by sale, gift, or otherwise, shall be null and void," are to be taken in the widest possible sense as null and void against all the world, including even the Vendor, or to be taken in the comparatively limited sense attached to them by the Courts in *India*? Their Lordships adopt the language of the Chief Justice, who, in the judgment of the Court, expresses his opinion, that the object was to make the sale null and void, so far as it might be



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necessary to secure the execution of the decree, relates only to alienation which would affect the Creditor who obtained the attachment. That appears to their Lordships to be the true meaning of the section. It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bona fide* Purchaser by the Vendor could be set aside by the Vendor himself; the words must, therefore, necessarily be read with some limitation. It appears to their Lordships, that their construction must be limited in the manner indicated by the Chief Justice, on the ground, that they were intended for the protection of the Creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain executions.

Reference has been made to section 271, which is to this effect: "If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of Decrees against the same Defendant and not obtained satisfaction thereof." This section only applies where there has been a judicial sale, and appears to their Lordships to have little or no bearing on the question in the present case, which is, whether or not under the circumstances a private sale was valid.

Their Lordships understand that the Courts in *India* have generally proceeded upon the view taken by the Chief Justice and the majority of the Court, and they would be unwilling to interfere with an estab-



lished course of practice unless they came to a very clear opinion that it was wrong.

Under these circumstances, their Lordships will humbly advise Her Majesty that the Decree of the High Court should be affirmed, and this appeal dismissed, with costs.

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Advocate High Court  
Jammu & Kashmir  
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THE GOVERNMENT OF BOMBAY ... Appellant ;

AND

DESAI KULLIANRAI HAKOOMUTRAI ... Respondent.\*

*On appeal from the High Court of Judicature at  
Bombay.*

THE action out of which this appeal arose was brought by the Respondent against the Government of *Bombay* in the district Court of *Surat*, to establish his claim as of hereditary right to an annual payment of Rs, 1,274 for a *Palkhi Huk* (Palanquin allowance), which was discontinued by the Government on the death of his Father, the *Desai Hakoomutrai*, in

12th, 13th, &  
14th March,  
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An annual allowance for *Palkhi Huk* (Palanquin allowance) to the holder of the hereditary office of *Desai* of *Broach*, held under a *Jaghiregrant*, charged by former native Governments

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on the land revenues of that *Pergunnah*, is incident to the tenure of *Desai*, and is not resumable by Government.

Such money allowance paid by Government out of the land revenue of a particular *Pergunnah* to successive *Desais*, for upwards of thirty years, does not create a prescriptive title, as such money payment is not "immovable property" within the meaning of *Bom. Reg. of 1827*, sect. 1, cl. 1.



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1863, on the ground that it was originally granted as a matter of favour, for the lifetime of the first Grantee, and was, therefore, liable to resumption at the discretion of the Government.

The Respondent claimed the right to the *Palkhi* allowance as an ancient hereditary assignment of revenue, appurtenant to his office as hereditary *Desai* of *Broach*, as well as to an *Enam* village to which he had right under a perpetual and hereditary tenure, and which *Palkhi* allowance was originally granted to his ancestors as holding the hereditary public office of *Desai* of *Broach*, by the Government of the Country for the time being, and by them enjoyed in succession as of right from time immemorial; and which assignment and allowance had been confirmed and continued to them, as of right, by successive native Governments; and that the allowance had been inherited by them in lineal succession for at least four generations; from one *Bhikharidas*, the great Grandfather of the Respondent's Father, *Hakoomutrai*, down to and including his Father, upon whose death payment was withheld from the Respondent, his Son and heir, and hereditary *Desai*, in direct succession to him by the Government.

The Government, however, refused to make the above allowance to the Respondent, or to recognize his hereditary right thereto, first on the ground, that the assessment of revenue forming the allowance, was not made for *Desaiship* service; secondly, that the *Palkhi* right was not of the nature of an ordinary *Enam* grant; and, thirdly, that the same was granted to the original holder personally, as a personal grant liable to cease on his death, and that to allow



or not to allow the continuance of a grant or right of this kind depended upon the pleasure of the Government, who, they contended, could stop the same on the grounds of the receiver of the allowance not being worthy to receive the same, or on any other ground, without assigning any reason.

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The Decree of the District Judge of *Surat* Mr. C. G. against *Kemball*, dated the 12th of *June*, 1867, decided the title of the Respondent to the *Palkhi* allowance, as an hereditary right. The judgment stated, that the Plaintiff (the Respondent) was a *Desai* of *Broach*, and as such enjoyed undisturbed possession to the present day of a grant of the *Enam* village, as a *Jaghire* of that, and the same was added, expressly for the expenses of keeping up a Palanquin, the allowance in dispute; and the judgment then decided, that an allowance of this nature could not have been in its origin more than a personal or life grant; and upon this ground decided against the claim of the Plaintiff, and the District Judge concluded his judgment by deciding, that in his opinion, the Plaintiff had failed to establish that the Grant was hereditary prior to the accession of British rule, and that, as to what followed after the year 1803, there was no evidence that the *Bombay* Government, either directly or by implication ever consented to regard it as such; but that, on the contrary, the correspondence of the Government at those early times showed without a doubt that this was one of the allowances which they intended uniformly to consider life grants, to be resumed at pleasure.

On appeal to the High Court of *Bombay*, a Division Bench, comprised of the Judges *Tucker* and *Gibbs*, reversed this judgment and decreed in



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favour of the Respondent's hereditary title, declaring that he was entitled to the *Palkhi* allowance from the date of his Father's death, and decreed the arrears with interest.

Mr. Justice *Tucker*, in delivering judgment, after stating, that the District Judge appeared to have rejected the Respondent's claim on the sole ground of inferences derived from the Reports of eminent Indian Statesmen, said :—" I think that this was not a proper way of dealing with a claim like the present one. The opinions of Indian Statesmen so learned and distinguished as the late Lord *Teignmouth* and the Hon. *Mount-stuart Elphinstone* with respect to the practice and policy of the *Mogul* Emperors and of other native Sovereigns who ruled in *Hindoostan* prior to the establishment of the British Empire in *India*, though entitled to great respect, are of no judicial authority, and in a Court of Justice should not have been allowed to prevail against the positive evidence of facts, and the legal presumptions which may be deduced from these facts;" and after observing that the Reports quoted by the District Judge admitted the existence of many exceptions to the theory adopted by him, proceeded as follows :—" As might have been inferred *à priori*, the acts of despotic and arbitrary Governments with respect to such Grants were not uniform. To this fact the Records of this Court and the reports of the High Courts in each of the Presidencies, and of the *Sudder Dewanny Adawlut*, to which they succeeded, bear abundant testimony, and it has frequently been declared from this Bench, with respect to *Jaghire* and other analogous grants, that no general rule can be laid down regarding them, and that the rights of persons to whom



such Grants have been made, and of their heirs and representatives, must be determined in each particular case by the language of the Deed by which the Grant was conferred, or in the absence of any such Deed, by the surrounding circumstances," and he decided, that the Respondent was entitled to succeed as, first, in the absence of the original Deed of Conveyance or Grant the long enjoyment of Plaintiff's ancestors during four generations successively, and for a period of more than a century, created a legitimate presumption that the allowance was conferred on the original Grantee and his heirs; and secondly, because the uninterrupted enjoyment of Plaintiff's Grandfather and Father under the Order made by the Government of *Bombay* on the 7th of *February*, 1808, which extended from that date to the commencement of 1856, gave to the Plaintiff a statutory and indefeasible title: and he held, on these grounds that the Decree of the District Judge ought to be reversed and the Respondent declared entitled to the *Palkhi* allowance, with interest to the date of payment.

Mr, Justice *Gibbs*, who concurred with Mr. Justice *Tucker*, by his judgment, after a careful examination of the evidence, declared that the Respondent had a good case on the merits, and had proved his claim, and then proceeded on the second point in these terms:—"There was an uninterrupted enjoyment of this allowance for more than forty-five years between the date of the confirmation of Government in 1808 and the death of *Hakoomutrai* in 1863 without any re-grant by Government; but on the other hand, by a continuation of the Grant as of right to *Hakoomutrai* on his Father's death, and

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I am, therefore, unable to arrive at any other conclusion than that *Hakoomutrai*, and that in consequence the Respondent, has acquired a prescriptive title under *Bom. Reg. V. of 1827, sect. 1.*"

From such Decree this appeal was brought.

Mr. *Forsyth* Q. C., and Mr. *H. C. Merivale*,  
 for the *Bombay* Government :—

Admitting the original *Sunnud* by *Damayee Guicowar* to the Respondent's ancestor to be valid, and proved as evidence in the suit, yet the annual *Palkhi Huk* allowance there mentioned was only a personal grant, and if continued to his successor by the then ruling Power, was only one of favour, not of right. The English Government took *Broach* by conquest in 1803, but no new Grant was made by the British Government to the then *Desai* or to his successor. The condition under which the original Grant was formerly allowed no longer then existed. Certainly, the Court below was wrong in holding, that the *Palkhi* allowance was of an hereditary nature, and that under *Bom. Reg. V. of 1827, sect. 1, cl. 1*, the Respondent had acquired a title by prescription. Such allowance was purely personal.

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the  
 Respondent :—

First, the *Sunnuds* relating to the *Palkhi* allowance are sufficiently proved; *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai (a)*. Such an allowance is legal and alienable; *Sumbhoolall Gird-*

(a) 10 Moore's Ind. App. Cases, 192.



*hurlall v. The Collector of Surat (a)*. Those Grants refer to such allowance having been previously granted by the native Governments, for the time being. The right was admitted by the British Government in the years 1808 and 1828, by continuing the allowance to the Respondent's ancestors, who successively, during four generations, and in a line of lineal descent for a period of more than one hundred years had, as hereditary *Desais* of *Broach*, received the allowance; therefore, the High Court was right in deciding in favour of the presumption contended for, that the original Grant of the allowance was in its nature an hereditary Grant.

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Secondly, before the year 1861, when the Government first decided upon treating the *Palkhi* allowance as a life annuity merely, the same allowance had been enjoyed, without interruption, for a longer period than thirty years by the Respondent's Father, *Hakoomutrai*, and his ancestors in succession, as appurtenant to their hereditary office of *Desai*, and the Respondent acquired a statutory prescriptive title under *Bom. Reg. V. of 1827, sect. 1, cl. 1.*

Judgment having been reserved, was now delivered by

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The Right Hon. Sir JAMES COLVILLE:—

The question raised by this appeal was, whether the Respondent has an hereditary right to receive out of the public revenues of the Presidency of *Bombay*, an annual allowance of Rs. 1,274: 4: 2, notwithstanding an Order of the Government, dated the 28th of *November*, 1861, which declared it to be

(a) 8 Moore's Ind. App. Cases, 1.



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a mere personal allowance, and as such resumable; and that it was to cease on the death of the then recipient—the Respondent's Father.

The Respondent is *Desai* of the *Pergunnah* of *Broach*. His office, once important, is now a mere sinecure, its functions being exercised by other Officers. But such as it is, it is admitted to be held by him, together with an *Enam* village enjoyed with it, by hereditary right. The allowance in question is, however, not a necessary incident to the office of *Desai*, nor is it held by the same title as the village. His case as to it is, that upwards of a century ago the then native ruler of *Guzerat* conferred upon one of his ancestors, and predecessors in the office of *Desai*, as a reward for distinguished service, the grant of a *Palkhi* or Palanquin, together with the allowance in question, the latter being the sum fixed for the *Palkhi* expenses, and charged on the land revenues of the *Pergunnah* of *Broach*. He alleges, that this Grant was confirmed by the different dynasties who have since ruled in *Guzerat*, and finally by the British Government in 1808; and he insists, that the allowance thus enjoyed is hereditary in his family, and now irrevocable by the Government.

The case made by the Government in answer to this claim, is that the *Palkhi* right was not granted for *Desaiship* service; that it is not of the nature of an ordinary *Enam*; that it was granted to the original holder personally, and was liable to cease on his death; and that to allow, or not to allow, such a right depends on the pleasure of Government. The only issue settled in the cause was, whether the right claimed was perpetual, or whether



the Government was competent to make it cease whenever they pleased to do so.

The *Zillah* Judge, who tried the cause in the first instance, determined this issue in favour of Government, and dismissed the suit; his decision was reversed, and a Decree made in favour of the Respondent by a Division Bench of the High Court of *Bombay*; and the present appeal is against that Decree.

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The grounds of the judgment of the High Court are thus summed up by Mr. Justice *Tucker*: "I consider, then, that the Plaintiff is entitled to succeed in this suit (1) because, in the absence of the original Deed of conveyance, or Grant, the long enjoyment of the Plaintiff's ancestors, during four generations successively, and for a period of more than a century, creates a legitimate presumption that the allowance was conferred on the original Grantee and his heirs; and (2) because the uninterrupted enjoyment of the Plaintiff's Grandfather and Father, under the Order made by the Government of *Bombay* on the 7th of *February*, 1848, which extended from that date to 1856, gave to the Plaintiff a statutory and indefeasible title."

Their Lordships propose to deal, in the first instance, with the second of these propositions; but, before doing so, they will shortly review the proceedings of the British Government with reference to the allowance claimed, because the effect of those proceedings has an important bearing upon both propositions.

The territory of which *Broach* forms part was annexed, with the rest of *Guzerat*, to the *Mogul* Empire, by *Akbar* in 1572, and, from that time to



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1685, was governed by a *Nawab*, or *Soubahdar*. The sovereignty over it then passed to the *Mahrattas*, and seems to have been exercised by the *Guicowar* until 1772. In that year *Broach* was taken by the British, and was held by the East India Company until 1783, when it was ceded to *Scindia*. That *Mahratta* power held it until 1803, when it finally became British territory, under one of the Treaties concluded with *Dowlut Rao Scindia*. The office of *Desai* appears to have been held by the Respondent's ancestors during all these changes of dynasty. His Grandfather, *Dowlutrai*, was found in possession of it by the British in 1803; and it would appear from the evidence, continued to receive the emoluments of office which he had previously received (including for some time the *Palkhi* allowance), but subject to the condition of submitting to the orders which the Government of *Bombay* might pass respecting any increase or reduction of them. On the 31st of *May*, 1807, the Revenue Commissioners at *Broach* made their Report to Governor *Jonathan Duncan*, upon several matters previously referred to them, which included the claims of the *Desais* in the territories in question. That document was not produced in the Court below, and the High Court has drawn various inferences, unfavourable to Government, from its non-production. It has, however, been brought before their Lordships in the supplemental record; and has been treated as part of the evidence in the cause.

One of the papers forming the Appendix to this report, No. 51, is entitled "Statement of the Income assigned to the *Desais* of the *Broach Pergunnah*, as taken from separate statements given in by each



under their respective signatures." From this it appears, that what *Dowlutrai* claimed was an *Enam* village, under a Grant to his ancestor, *Khooshalrai*, from the *Guicowar*, in A.H. 1140, corresponding with 1727-8; the *Palkhi* allowance in question; rights in certain *Passaita* land; and some other customary allowances or perquisites in money or in kind. The recommendations of the Commissioners in the body of the report were (par. 34), that the last-mentioned allowances and perquisites should be abolished or reduced; that the right of *Desai Dowlutrai's* family to the *Enam* village should be acknowledged; and that they should, for the present, be allowed to hold their *Passaita* land, subject to such arrangements as Government might think fit to adopt for restoring to the State all illegally alienated land.

Nothing was there expressly said about the *Palkhi* allowance; but it may be included in the general recommendation contained in these words:—"The amount of such of these (*i.e.*, those fees and emoluments) as Government may be of opinion they (the *Desais*) have a tolerably fair right to, from the length of time they may have enjoyed them, may be calculated from the accompanying statement, Nos. 51 and 52, and a *per centage* in proportion allowed to them on the Government Land Revenue, which should be made payable to them from the Collector's Office only, in lieu of all secret or avowed perquisites and emoluments whatever."

The action which the Government of *Bombay* took on this report, is shown by the 16th paragraph of a Letter, dated 7th of *February*, 1808, in these words:—

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“ Proceeding next to the *Desai's* allowances, the village of *Kallum*, or (as written in the *Sunnud*) *Kullub*, is confirmed by Government, as you recommend, as on the same grounds the *Palanquin* establishment with *Sepoys*, and *Peon's* allowance to *Dowlutrai*, from the beginning of the current *Mergsaul*, but without arrears, for the time the same has been suspended.

“ The article *Sootchumra* is to be resumed from him and the other *Desais*, on the like principle, as ordered in respect to *Jee Baboo*, and the article of *Sadur*, as applicable to all those *Desai* offices, is left to you to confirm or revoke, according to your sense of its justice and expediency.”

We accordingly find that *Dowlutrai*, in his subsequent *Kaboolyat*, or acknowledgment of the 20th *March*, 1809, whilst he admits the receipt of an order for the payment of the money appertaining to the customary allowance (*dustoor*) and *Passaita* land, and agrees to treat those allowances as subject to the future orders of Government, ceases to make mention of the *Palkhi* allowance, obviously treating that as unconditionally confirmed to him.

That it was regularly paid to him up to the time of his death is shown by the revenue accounts of the Collector of *Broach*, which have been produced, in which, at least after *April*, 1809, it is treated as one of the general charges on the revenue.

*Dowlutrai* died in 1828. He was succeeded in the office of *Desai* by his Son, *Hakoomutrai*, who thereupon applied for the *Palkhi* allowance to the Collector of *Broach*. It was paid to him by that Officer without any fresh or distinct Grant or order of the Government, the payment continuing as before to be



entered in the Collectorate accounts as a general or permanent charge on the revenues of the District. this state of things went on without question until the year 1856. In that year the right of *Hakoomutrai* to this allowance was first questioned. He was required to explain how he was in receipt of it, and made, on the 28th of *December*, 1856, the statement respecting his right. No final Order, however, seems to have been passed by Government on this matter until the 28th of *November*, 1861, when, on the Report of the Revenue Commissioners, dated the 3rd of *October* in that year, it was resolved, as follows :—"The allowance is clearly a personal allowance, and should, as recommended by Mr. *Peile*, be transferred to the head of 'Life pensions.' It should cease on the death of the present incumbent, *Hakoomutrai*."

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*Hakoomutrai* died some time in the year 1863. The payment of the allowance then ceased, and in *December*, 1864, the Respondent commenced this suit to establish his hereditary right to it.

Their Lordships are unable to concur with the Judges of the High Court in the conclusion that, upon the facts thus stated, the Respondent had, under the provisions of the *Bombay* Regulation V. of 1827, cl. I., sect. 1, acquired a title by prescription, which enabled him successfully to maintain his suit, whatever might have been the original title of his ancestors to this *Palkhi* allowance. They are by no means satisfied that the allowance, though-payable out of the Government revenue of a particular *Pergunnah*, can properly be said to be "immovable property," within the meaning of the clause in question. It did not constitute a charge which



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could be enforced against the land, or, since the year 1808, against the revenues of the land prior to the claim of Government. The utmost right of *Dowlutrai* after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury.

Nor, again, are their Lordships satisfied that there has in this case been such a possession or enjoyment of the allowance under a claim of hereditary right for thirty years without interruption, as would bring the right, if in the nature of immovable property, within the operation of that Regulation. The question between the Government and the Respondent is, whether the allowance was enjoyed by hereditary right, or by virtue of a grant for life, express or implied, to each successive taker. So long as *Dowlutrai* lived, his enjoyment of the allowance would be as consistent with the one contention as with the other.

A *Faghiredar* for life cannot convert his life tenure into a perpetual tenure by living for more than thirty years. The period of thirty years, therefore, would only begin to run from 1828, when *Hakoomutrai* began to receive the allowance without a fresh grant; and, as it may be assumed, under a claim of hereditary right. But it seems to their Lordships that the interruption to this enjoyment may fairly be taken to have begun in 1856.

The right of *Hakoomutrai* was then called in question; and there was the commencement of an investigation of his title which appears to have lasted, until the final Order of Government in *November*, 1861. There was, on the part of Government, no



admission, express or implied, of his hereditary right after 1856. And for these reasons they have come to the conclusion, that the Regulation affords no bar to the trial of the question between the Government of *Bombay* and the Respondent upon its merits.

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Again, both the learned Judges of the High Court appear to have acted on a presumption, that the title of the Respondent to an hereditary grant was founded, not on the documents produced, but on some lost or missing *Sunnud* which contained words of inheritance. In making this presumption they drew certain inferences against the Government, and in favour of the Plaintiff, from the non-production of the Report of the Revenue Commissioners at *Broach* of the 31st of *May*, 1807. That document is, however, now before their Lordships; the appeal has been argued as if it were part of the evidence in the cause, and the inferences to be drawn from it must be drawn from its actual, and not from its supposed, contents.

Their Lordships will now consider what is the effect of the evidence in support of the Plaintiff's title.

The first trace of the allowance in question is to be found in a *Perwannah* which, if not a Grant, recites a Grant by the *Nawab Hyder Joolee Khan* to *Khoosalrai Desai*, in recompense of his extraordinary services as *Desai*, fixes the allowance for the sustentation of that dignity at Rs. 1,972 (being Rs. 1,200 for the *Palkhi*, and Rs. 772 for the servants), and directs that sum to be paid to him annually. The only date on this document is "the 13th *Shaban*, in the 9th year of the reign," a date which it would be difficult to fix. But as the Grant purports to have been made by the *Nawab*, and there is no mention of the *Guicowar*, it may be presumed that this



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*Perwannah* was issued before the year 1685, when the actual sovereignty over the territories in which *Pergunnah Broach* is situated, passed into the hands of the *Mahrattas*.

This Grant, however, whatever its nature, appears to have been afterwards superseded; for the earliest *Mahratta* document produced by the Respondent in support of his title, and said to bear a date corresponding with the year 1753-54, is in favour of *Bhikaridas*, the Son of *Kooshalrai*, and imports the grant to him by the *Guicowar* of a *Palkhi*, with an allowance of only Rs. 1,100 for keeping it up. This document seems to have been intended to operate both as a *Sunnud* or Grant, and as *Perwannah* or Order addressed to the Officers who were to pay the allowance; for it is stated that, across the *Hindee Perwannah*, to the Officers, there is written a memorandum in Persian to the effect, "a *Sunnud* for a *Palkhi* in the name of *Bhikaridas Desai*." *Bhikaridas* was succeeded by *Famiyatrai*. Several *Perwannahs* issued by the *Guicowar* during the life of this *Desai* are produced, but none of them show how his receipt of the allowance began. Those of 1760-61 and 1762-93 refer to interruptions of his existing right, not to the commencement of it. That of 1772-73, contains proof of an augmentation of the previously existing allowance by the wages of seven *Sepais* thereby assigned to him. *Famiyatrai* died in 1774-75, and thereupon the *Guicowar* of the day issued what is termed "a consolatory Letter," in the shape of a *Perwannah*, to the revenue Officer at *Broach*, which contains this passage:—

"*Famiyatrai Desai* is dead. Giving consolation to his Son, *Dowlutrai, Desai* in many ways, you are,



from time to time, to get the business and affairs of the *mehal* transacted by his hands, as has been done; and you are to pay, from time to time, his *Palkhi* and *Sebandi* allowances as they now exist." The whole of this document, including the expression that "they" (*Dowlutrai* and his ancestors) "had from ancient times belonged to the *Sirkar*," implies the existence of at least a customary right of succession to the allowance with the office of *Desai* from Father to Son, though perhaps a right capable of being interrupted or destroyed, like other rights under a despotic Government, by the will of the Sovereign.

This is the latest document issued by the *Guicowar*; and indeed the date as given in the record is later than the taking of the City of *Broach* by the British. The authority however of the *Guicowar*, may at that time have continued to exist in the surrounding District.

The next document is the *Perwannah* of *Scindia*, issued on the application of *Dowlutrai* in April, 1786. It recites the application of *Dowlutrai*, which appears to have been in the nature of a claim by hereditary right since it refers to the Grant to his Grandfather, *Bhikaridas*, as the foundation of his title, making no mention of any intermediate Grant to his Father, *Jamiyatrai*. The allowance was then fixed by *Scindia* at Rs. 1,352, and directed to be continued to *Dowlutrai* as *Desai*. And a further direction was given to take a copy of the document and to return the original (called a *Sunnud*) to the *Desai* for his use. This is the last of the native documents, *Dowlutrai* being still alive and in the enjoyment of the allowance when the Territory of *Broach* was ceded to the British Government in 1803.

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Reviewing these native documents, their Lordships are unable to find any which import, by express words of inheritance, that the *Palkhi* privilege with its allowance was to be enjoyed from generation to generation by the original Grantee and his heirs. And it is now clear, that the Report of 1807 does not, as the Judges thought it might, disclose any evidence from which the existence of a *Sunnud* in those terms may be inferred. Their Lordships are disposed to infer from the terms of *Scindia's Perwannah*, and the earliest of the *Guicowar's Perwannahs* that there was no *Sunnud* other than those documents importing the grant of the allowance to *Bhikaridas*; and the confirmation of the allowance to *Dowlutrai*. On the other hand, the documents do not appear to support the Appellant's contention that the allowance was merely personal to each taker; and the subject of a separate grant to each in succession.

There is no trace of such a Grant in favour of *Famiyatrai*; when *Dowlutrai* succeeded to *Famiyatrai* he was treated as succeeding to the allowance by the same title to which he succeeded to the *Desaiship*; the confirmation of *Scindia* is founded on an original Grant to *Bhikaridas*; and the whole tenor of the documents is in favour of the conclusion that, after the allowance was granted, it was treated and considered as part of the emoluments of the hereditary office of *Desai*.

Their Lordships are not disposed to treat the proceedings of the British Government in 1808 as amounting to a new and enlarged Grant. Nor do they consider that the accounts, or the acts of the Government Officers on the death of *Dowlutrai*, though they afford evidence that Government up to



1856, considered the allowance to be a permanent alienation of revenue in favour of this family, are conclusive against the Government's present claim of a right of resumption.

They think that the reasonable construction of the proceedings in 1807 and 1808 was, that the Government of that day intended to confirm, and did confirm, the title of *Dowlutrai*, whatever it might be, without enlargement but also without diminution. But the inference which their Lordships draw from the Report and the Letter of Government thereon is, that the Government of that day was dealing, and intended to deal, not with the mere rights and allowances of the individual *Dowlutrai*, but with the emoluments of the hereditary *Desaiship* held by his family. And it is on the special ground that, under the native Rulers, this allowance was treated as permanently annexed to the office, and was confirmed in 1808 by the British Government as appurtenant to the office, and not upon the grounds assigned by the High Court (from some of which, as they have already intimated, they dissent), that their Lordships have come to the conclusion that they ought humbly to advise Her Majesty to affirm the Decree under appeal, and to dismiss this appeal with costs.

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AND

SIVANANTHA PERUMAL SETHURA-  
YAR ... } *Respondent.\**

*On appeal from the High Court of Judicature  
at Madras.*

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A., who had a first or royal Wife living, who died without issue, intermarried on the same day with B. and C. Both Wives had male issue, C.'s Son being born first. Held, that C.'s Son was entitled to succeed to an impartible zemindary in preference to B.'s Son, as by Hindoo Law priority of birth was not affected by the prior marriage with B., the then senior Wife.

If a party rely upon a special custom of a family to take the succession to the zemindary out of the ordinary Hindoo Law, such custom must be proved to be ancient and continuous.

A Letter of the Collector containing a summary of the statements by Zemindars for information of the Board of Revenue in a dispute, as to the right of inheritance to a zemindary in the same District, is not admissible as evidence.

THE object of this suit was to establish the title of the Respondent to succeed to an impartible zemindary, called *Urkadu*, as the heir of the Appellant's late Husband, *Zemindar Kottalinga Sethurayar*.

The Respondent claimed to be heir, as the Son eldest in age of the *Zemindar's* Sons, and also as being the Son of the second Wife. The Appellant insisted, that she was the second Wife, and that the Respondent's Mother was the third Wife of the *Zemindar* and that her Son, as being the Son of the senior sur-

Present :—Members of the *Judicial Committee* :—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.



viving Wife, though born after the Son of the third Wife, was entitled to succeed to the *zemindary*, in preference to the Respondent.

*Kottalinga Sethurayar* was a *Zemindar Polygar* in the *Zillah* of *Tinnevelly*, *Madras*. He belonged to the caste called *Maravars*, among whom polygamy prevails.

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Both sides admitted first, that the Sons of the first or royal Wife succeeded to the *zemindary* in priority to Sons of any other Wife, and without reference to the age of her Sons, and secondly, the fact, that the first Wife had died without issue.

The facts were these :—

*Kottalinga Sethurayar* married three Wives. *Kanthimathiammal*, the first or royal Wife, died in his lifetime, without issue. The Appellant and the Respondent's Mother were the other two Wives, and were married to him on the same day, and the first question in the appeal was one of fact, whether the Appellant or the Respondent's Mother was the first married to the late *Zemindar*. Both Wives were of the same class.

The Respondent was born in the year 1838; the Appellant's eldest Son, *Murthu Ramalinga Sethurayar*, was not born till 1849.

The second question in the appeal was, whether, assuming the Appellant to have been the *Zemindar's* senior surviving Wife, her Son, though younger in age, was or not entitled to succeed to the *zemindary* in preference to the Respondent as the Son of the junior Wife.

It appeared from the documents put in evidence, that previously to the suit in which the above questions arose, regarding the succession to the *zemindaries*



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of the *Maravars* in the District of *Tinnevelly*; a similar dispute had arisen respecting the *zemindary* of *Purayar*, in the same District of *Tinnevelly*. In that case, the deceased *Zemindar* left two Sons, one aged two years, by his second Wife, and the other, aged eight years, by his eighth Wife, and the law Officers of the then *Sudder Dewanny* Court gave their opinion, that by the Hindoo law, the elder in age of the two Sons would be his Father's heir; but the Government entertaining an opinion that this was not the rule of succession in the District, directed the opinions of the *Zemindars* in the District to be taken as to the rule of succession among the *Polygars* there. The opinions of twenty *Zemindars* in the District were accordingly taken, and that of the great majority was, that the Son of the senior Wife for the time being, though younger in age, was to be preferred to the elder Son of a junior Wife. The Government acted on this opinion, and the Son of the senior Wife succeeded to the *zemindary*. It further appeared, that some time in the year 1849, the late *Zemindar Kottalinga Sethurayar* was requested by the Collector of *Tinnevelly* to state for his information the rule of succession which prevailed in his *zemindary* of *Urkadu*; and on the 17th of July, 1849, and before the birth of the Appellant's Son, that he had addressed an *Arzi* to the Collector, in which he stated, that when a *Zemindar* of his caste had Sons by different Wives, the Son of the first Wife always succeeded to the *zemindary*, and that in the event of there being no Son by the first Wife, the first-born Son amongst the Sons of the other Wives had a right to succeed to the *zemindary*, and that in



such case the succession did not depend upon the order in which the Wives were married. This *Arzi* was said to have been stolen from the Record Office and another substituted, and was not in evidence.

The Respondent in the Courts below relied on two *Arzis* addressed to the Collector of *Tinnevelly* by the *Zemindar*, dated respectively the 18th of *August*, 1853, and 28th of *November*, 1853, as showing the *Zemindar* at the date recognized the Respondent as the heir to the *zemindary*.

In the year 1861, the Appellant instituted a suit, No. 3, of 1861, on behalf of herself and her eldest Son, *Murthu Ramalinga Sethurayar*, in the Civil Court of *Tinnevelly*, against the late *Zemindar Kottalinga Sethurayar*, the Respondent and another, in order to obtain a declaratory Decree of the Court establishing the right of the Appellant's Son to succeed on the death of his Father, the first Defendant, to the *zemindary*.

The suit was heard before the Judge of the Civil Court of *Tinnevelly*, who by his judgment, dated the 21st of *February*, 1862, decreed that the Son of the Appellant, was the lawful heir of the *Zemindar*, and was entitled on his decease to the *zemindary*.

The *Zemindar Kottalinga Sethurayar* died on the 25th of *August*, 1862, pending an appeal from this decree, which was reversed.

The Respondent filed his plaint in 1863, in the Civil Court of *Tinnevelly*, against the Appellant, the three minor Sons of the Appellant, and others, claiming the *zemindary* as the eldest Son and heir of the late *Zemindar*, and also claiming other real and personal estates of the late *Zemindar*, which are not material to the question in this appeal.

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By the statement, or answer of the Appellant, in her own right and as Guardian of her eldest Son, she insisted, that the Respondent was the Son of the late *Zemindar's* third Wife ; that it was arranged that the Appellant should be married as second Wife, the first Wife being then living, in order that her Son might get the *Puttam* (right of succession), and that first Defendant as eldest Son of the Appellant, as second Wife standing next in rank to the first Wife, was the sole heir to the *zemindary* of *Urkadu*, according to the invariable and long standing usage of the *zenindary*. The answer then referred to the Decree in the suit, No. 3, of 1861, and alleged, that all *zemindaries* in the District had the same usage, and that there was the same family usage in the *zemindary* in question, and submitted, that the eldest Son treated of in Hindoo law was the eldest Son of the senior Wife, and that it did not, therefore, apply to the Respondent.

Among the evidence was a Letter of the Collector of the District to the Revenue Board, containing the substance of the delarations of the *Zemindars* of the District before mentioned in respect to succession of the *Marvars* in he District of *Tinnevelly*. Evidence as to the priority of the respective marriages was gone into, and on the balance of the evidence on both sides, and the probabilities of the case, it established, that the Appellant was married to the *Zemindar* before the Respondent's Mother, though on the same day.

The suit came on to be heard before Mr. *W. Hodgson*, the acting Judge of the Civil Court of *Tennevelly*, on the 29th of *August*, 1864, who gave the following judgment :—The Court being of opinion,



that the first Defendant (the Appellant's Son) has established his right and title to succession to the *zemindary* of *Urkadu*, as the eldest Son of the Appellant, the second and senior Wife of his Father, the late *Zemindar*, dismisses the Plaintiff's (Respondent's) claim, so far as it relates to the succession to the *zemindary*. And a joint judgment delivered by the Court composed of Messrs. *Hodgson & Goldre*, on the same day established the right of the Appellant's Son to succeed to the *zemindary*.

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The Respondent appealed from this Decree of the Civil Court, to the High Court at *Madras*, the Respondent relying, among others, as reasons of appeal:—

First, that the case was governed by the general Hindoo law, which recognized no priority of a Son arising out of priority of marriage, save in the instance of the first Wife.

Secondly, that the burthen of proving the special custom relied on by the Appellant was on her, and that she had not established it, as the evidence was untrustworthy; that the declarations of the *Zemindars* were not evidence, and that the course adopted by Government in the *Purayar* case, even if proved, could not affect the question, the family in question being of a different caste.

The appeal came on to be heard before the Chief Justice, Sir *Colley H. Scotland*, and Mr. Justice *Holloway*, and that Court by its judgment of the 12th of *February*, 1866, reversed the Decree of the Civil Court. The material part of the judgment of the Court was in these terms:—

“There is no doubt, that the Plaintiff is the first-born Son of the late *Zemindar*, and there is no dispute as to the relationship in which the parties



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stand to each other and to the *Zemindary*, except in regard to the priority in point of time of the marriage of the Plaintiff's Mother, and that issue it will only be necessary to allude to, after we have expressed the decision at which we have arrived upon the two main questions in the case. First, then, has it been shown that by established custom, where there are several Wives and the first Wife has no male issue, the right of succession passes to the eldest Sons of the other Wives, according to the priority of their Mothers' marriages, and not to the first-born of all the Sons? It is not pretended, that such a custom has at any time received judicial sanction, and what the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has by common consent been submitted to as the established governing rule of the particular family, class, or District of Country, and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty. Applying that rule of law here, we are of opinion, that the evidence wholly fails to support the custom set up. The loose statements made by the Witnesses on both sides of what they had generally heard and understood to be the custom are of no avail, and beyond these statements the only evidence in the suit is that given by the late *Zemindar* himself, and one or two Witnesses for the Defendants, as to two instances of succession to the *zemindary*, when there were Sons by several Wives, according to priority of marriage. This, at best, would have been slight evidence, but the circumstances here throw such discredit on the



late *Zemindar's* testimony as to make the evidence wholly unreliable. It appears that in the year 1849 the *Zemindar*, in an *Arzi* to the Collector, and in the *Mahazarnama*, which he, with other *Zemindars*, then gave, stated that the right of succession, on failure of male issue by the first Wife, passed to the first-born of the Sons by all other Wives. Again in 1853, after the birth of the first Defendant, the *Zemindar* in his communications with the Collector treats the Plaintiff as his heir, and called him his '*pattathu kumaran*.' Further, we find that when he was, in 1861, charged with being concerned in substituting, amongst the records of the Collector's office, a spurious *Arzi*, stating that the Son of the Wife first married had the right to succeed, he not only denied the charge, but repeated his first statement as to the rule of succession. Soon after this, the Plaintiff and his Father, the *Zemindar*, became at enmity with each other, and a suit was brought by the present first and fourth Defendants against the Plaintiff and the *Zemindar* (collusively there can be little doubt as between the then Plaintiff and the *Zemindar*), in which the statements now relied upon, were made by the *Zeminder* as a Witness for the Plaintiff. It is impossible, under the circumstances, to place any reliance upon those statements, or the other evidence offered to support them. Then, with reference to the opinions of nineteen *Zemindars* of the District, upon which the Lower Court altogether rests its decision in favour of the custom; they are not the statements of Witnesses, but opinions obtained for the information of the Board of Revenue, upon the occasion of a dispute about the succession to another *zemindary*, the precise particulars of which we know

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nothing of in this case. They cannot, therefore, properly be regarded as any evidence in this case; but, even if evidence, they are merely individual opinions expressed in general terms, in which the *Zemindars* vary from each other, and from the opinions expressed at the same time by the Plaintiff's Father, and no effect can be given them, in support of the alleged special custom. We are thus brought to consider the second question, whether by Hindoo law, independently of particular custom, the Plaintiff is rightful heir to the *zemindary* and in determining it we are relieved from considering any qualification that the law may attach to the difference of caste amongst the Wives, as in this case there is no difference of caste. Heirship by right of primogeniture rests upon an exceptional rule of the general law of inheritance, applicable to *zemindaries* and other estates, which are considered in the nature of Principalities, and impartible. As respects all other property, except under certain strictly limited Grants from the Government, and in the case of some offices, the law at the present day does not recognize a right by succession, in one of several Sons, or one of the other male members of an undivided family, to the exclusion of the others, beyond the preferential claim of the eldest to manage the property. Now, no Work of authority or decision directly relating to the descent of property, which at the present day is governed by the rule of primogeniture was cited at the Bar, nor have we found any bearing materially upon the present question. We must, therefore, decide it upon principle, and by analogy to the existing general law of inheritance, and upon what we find laid down in early times, when primo-



geniture by the general law conferred some special proprietary rights and privileges which no longer exist. Upon general principle, where the Wives are, as in this case, of the same caste and rank, there is no sound ground of distinction, on which the birth-right of the first-born of all the Sons, can be denied. Whether the Plaintiff's Mother was second or third Wife of the late *Zemindar*, she was equally with the fourth Defendant, his lawful Wife and by the birth of the Plaintiff, his Father first acquired all the benefits, temporal and spiritual, which are ascribed to the birth of a Son, and the performance by him of the appointed exequial rights (*Menu* ch. IX. sects. 106, 107; *Colb. Dig.*, B. V. ch. 1, sect. 10). Then applying the general law of succession, which governs partible property, it favours strongly the Plaintiff's rights. All legitimate Sons of the same rank are upon an equality, though the offspring of several Wives, and though the number of Sons by each differs. The Sons severally take *per capita*, and their rights in the distribution of property are not affected in any way by the order of their Mothers' marriages (*Strange's "Hindu Law,"* Vol. I. p. 205). Seniority too, by birth, independently of the Order of marriages, gives the preferable claim to the management of the joint property. In the case of a plurality of Wives of unobjectionable caste, priority of marriage seems to be regarded by the law, only for the purpose of regulating the order of precedence amongst the Wives themselves, and the right of each to succeed as heir to the Husband, in default of Sons. But the Plaintiff's right derives still further support from the text of *Menu*, to which we were referred in the course of the argument. Although the passages relate directly

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to rights and Privileges of the first-born upon partition, which are no longer admitted, still they are not the less of force here, and in other cases to which, at the present day, the rule of primogeniture applies, so far as they show to which of the Sons of several Wives, rights of primogeniture passed. In *Menu*, ch. IX., after treating of the then privileged position of the first-born Son, and his rights upon partition, it is observed in section 122, with reference to the birth of a Son by a first married Wife, after the birth of a Son by a subsequently married Wife of a lower class, 'it may be a doubt in that case, how the division shall be made.' But in the next section it is declared, that the Son of the first married Wife is entitled to the preference, and after him, 'those who were born first, but are inferior on account of their Mothers who were married last.' Then in section 125, it is laid down that, 'as between Sons born of Wives equal in their class, and without any other distinction, there can be no seniority in right of the Mother, but the seniority ordained by law, is according to the birth. The effect of these sections, we think, clearly is (at least as Between the Sons of Wives of equal caste, other than the Wife first married) that the first-born of all the Sons possessed the right of primogeniture, and this view is in accordance with the other texts, and the commentary in *Dig.*, *Colb.*, B. V., ch. I., to which reference was also made in the argument. Upon the whole it appears to us, that as regards the rights of Sons by different Wives to inherit, whether in coparcenary or as sole heir (except perhaps the Son of the first Wife), the priority in point of time of their Mothers' marriages has never been regarded when the Wives were equal in caste



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and rank, and that the rule of primogeniture was, and is, the same in the case of Sons by several Wives of equal caste and rank as in the case of Sons by one Wife. For these reasons, we are of opinion, that by the general law of inheritance, the Plaintiff is heir to the *zemindary* by right of primogeniture. It is unnecessary to decide, whether a distinction exists in favour of the younger Son of a first Wife, as the former *Pundits* of this Court appear to have thought; and we desire to be understood, as not expressing any opinion upon the point, one way or the other. Our decision also leaves untouched the question, how far a difference of caste between the Wives and the Husband would affect the right of the first-born Son; but we may refer to some observations upon this subject to be found in the judgment of the Chief Justice in the recent case of *Pandaiya Televar v. Puli Televar* (1 Mad. High Court Reports, 483). Our decision being in favour of the Plaintiff's right by birth, upon the general law, it is not necessary to decide the other question raised, whether the late *Zemindar's* marriage with the Plaintiff's Mother was celebrated before or after his marriage with the fourth Defendant, it being the case of both parties that the marriages took place at different times of the same day. But we think it proper to observe, that the Court at present sees no sufficient ground for saying, that the right conclusion had been arrived at by the Lower Court."

The appeal was brought from this Decree.

Sir R. Palmer, Q.C., and Mr. F. H. Bowring,  
for the Appellant :—

First, on the question of fact, it is established by the evidence, that in point of time the marriage of



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the Appellant was first, and she was the second Wife and the Respondent's Mother, the third Wife of the late *Zemindar*, therefore, as held by the Court of first instance, the Appellant's Son, though younger in age than the Respondent, was, as issue male of the senior Wife, entitled to succeed to the *zemindary* in priority to the Respondent. They cited *Menu* (by *Grady*), ch. IX. sects. 105, 6, 7, 122, 123, 125; *Jagannatha's Dig.*, by *Colb.*, B. V., ch. 1, sect. 1, art. II., c. vii., ix., x., xii., xiii., xiv., xvii., xxvi., xxxvii., xxxviii., xl., xliii., xlv., liv., lv., lvi., and lvii., *Strange's "Hindu Law,"* Vol. I., p. 56 [2 Ed.], *Strange's "Man. of Hindu Law,"* sect. 149.

Secondly, the general Hindoo law of succession and inheritance has no application to the *Maravars* of *Tinnevelly*, The Appellant's Husband, being *Zemindar* of an impartible *Raj*, the succession was regulated by family custom and usage, to the eldest Son of the senior Wife.

Thirdly, even if the ordinary Hindoo law prevails, the eldest Son, to whom preference is given, means the Son of the first or royal Wife only, which question does not occur here, as she died without issue. It might be, if the second Wife was of superior caste.

Lastly, there has been, however, a denial of justice, as the High Court improperly rejected as evidence the Collector's summary of the opinions of the *Zemindars* as to the right of succession in *zemindaries* in the District of *Tinnevelly*, and without any further inquiry, or directing any issue as to the custom of the District and succession in this particular family, assumed that the general Hindoo law applied, and decided the case in the Respondent's favour on a misconstruction of Hindoo Law.



Mr. *Leith*, and Mr. *S. G. Grady*, for the Respondent:—

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As the Plaintiff relies upon a special custom of the family and usage in the Country where this *zemin-dary* is situate, to take the case out of the ordinary rule of succession by Hindoo law, the *onus probandi* was on her, and, we submit, she failed to establish the special custom. The High Court properly rejected the Collector's Letter containing a summary of the declarations of the *Zemindars*, made for information of the Government as to the custom in their *zemindaries*, as not being evidence in this suit; but even if the family custom in this *zemindary* was established, yet we contend, that the weight of evidence is against her contention, that she was the second or senior Wife of the Respondent's Father.

Next, we submit, that the High Court was right in deciding the question of succession and heirship by the general Hindoo law, and holding that the Hindoo law does not recognize priority of right in any Son as heir in respect of the priority of marriage of his Mother, save in the single instance of the first or royal Wife. No authority has been cited in support of the Appellant's contention, as none is to be found. According to Hindoo law in respect to the *Raj*, where there are Sons by different Wives, the eldest of the Sons, irrespective of the priority in point of time of the marriages, when the Wives are of the same caste and rank, as occurs in the present case, is entitled to succeed as heir to his father by right of primogeniture *Bhujangra'v bin D. Ghorpade v. Malojira'v bin D. Ghorpad* (a); *Sivanomanga Perumal v. Muttu Ramlinga Sethorai* (b). The

(a) 5 Bom. H. C. Reps. 161.

(b) 3 Mad. Rep., A. I. 75.



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theory of Hindoo law is, that where the Wives are of the same class, they are, with respect to the first born Son's succession, to be considered as one Wife. It is a necessary consequence, as the first Son has to perform his Father's funeral obsequies, and liable to his debts, *Strange's* "Man. of Hindoo Law," sect. 185, *Colb. Dig.*, Vol. II., p. 192 [3rd Ed., *Madras*].

Their Lordships' judgment was delivered by

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The Right Hon. Sir MONTAGUE SMITH :—

This is an appeal from the High Court of *Madras* in a suit raising the question of the right of succession to an impartible *zemindary* called *Urkadu* in *Tinnevely*. The litigants are two Sons by different Wives of *Kolalinga Sethurayar*, the late *Zemindar*.

*Kolalinga Sethurayar*, who was a Hindoo, married three Wives. The first, *Kanthunathi Ammal*, had no child. His other Wives were *Ramalakshmi Ammal*, the Mother of *Muttee Ramalinga Sethurayar* (the Appellant) and *Vellaithai Perumal Ammal*, (the Mother of *Sivanantha Perumal Sethurayar* (the Respondent).

Although the Mother, *Ramalakshmi Ammal*, is Appellant as Guardian of her Son, it will be convenient to speak of him as the Appellant, and of the other Claimant as the Respondent.

The marriages of the two Mothers took place on the same day in *June* 1836, but at different hours, and the priority in time of these marriages was a subject of contest in the suit.

The Courts in *India* have held, that the marriage of the Appellant's Mother was first solemnized, and that she, therefore, in order of time, was the second Wife, and the Respondent's Mother the third Wife of the *Zemindar*.



In the view their Lordships take of this case, it is not necessary to consider the correctness of this finding, and they, therefore, adopt it in dealing with the present appeal.

It appears that at the date of the marriages the Appellant's Mother was a child only ten years old, whilst the Mother of the Respondent was a girl of sixteen. The Respondent, as might naturally be expected from the relative ages of the Mothers, was born many years before the Appellant, and he seeks to recover the *zemindary* in this suit as the first-born Son of the *Zemindar*. The Appellant resists his claim on the ground that he, as the Son by the earlier marriage, is the rightful heir. The question is thus raised, whether the Son of the second Wife, although born after the Son of the third Wife, is entitled to inherit; in other words, whether the priority in birth of the Sons, or the priority in the marriages of their Mothers, both being of the same caste, is to prevail in determining the succession to an impartible *zemindary* in this District of *Madras*.

It appears from the pleadings and issues, that the Respondent, the first-born Son, relies on the general Hindoo law of succession, and on the custom of the family, which he affirms to be in accordance with it.

The Appellant alleges, that by the custom of the District he is entitled to the succession, and he also denies that the general Hindoo law is in favour of the Respondent's claim.

Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular Districts and families in *India*, but it is of the essence of special usages, modifying the ordinary law of succession that they should be

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ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

In the present case their Lordships agree in opinion with the High Court, that the Appellant has failed to prove the special custom which he undertook to establish.

It appears from the record that, in 1861, during the life of their Father, the late *Zemindar*, the Appellant brought a suit in the Civil Court of *Tinnevely* against the present Respondent, to have his right to the succession declared. He founded his claim on the usage in his Father's *zemindary* and "other *zemindaries*." The present Respondent then relied, as he still does, on the general Hindoo law, and the usage of the family. The Civil Judge was of opinion, that the evidence to support a family usage was insufficient for the purpose, but he thought there was sufficient proof of a usage prevailing amongst the *Zemindars* of the District that the Son of the senior Wife was to succeed. The decision of this Judge in favour of the present Appellant appears to have been reversed on appeal, on the ground that the suit was not maintainable during the life of the Father; but it has been necessary to advert to the suit because the evidence taken in it has by consent been brought into the present suit, and is the only evidence in it.

This evidence consisted, so far as proof of the family usage went, principally of the testimony of the late *Zemindar* himself, who was a party to the declaratory suit, and, evidently, he is not a trustworthy Witness.



for whilst in that suit he espoused the cause of the present Appellant, and gave evidence of the family usage in his favour, he had some years before, and after both Sons were born, given equally strong evidence of a custom the other way in support of the claim of the present Respondent. It is obvious that the *Zemindar's* testimony was influenced by his partiality for one Son or the other at the time of giving it, and is thus entirely untrustworthy. The other evidence is conflicting and wholly insufficient to establish any family custom. Indeed in the present suit both the Courts in *India* have so regarded it.

Then with respect to the usage of the District set up by the Appellant, the only evidence, apart from the conflicting testimony just referred to, which appears on the Record, is a statement of certain declarations alleged to have been made by some *Zemindars* under the following circumstances. In the year 1849 the Board of Revenue, acting as the Court of Wards, desiring to know which of the two minor Sons of the *Zemindar* of *Parayur* was to succeed him, requested the Collector of *Tinnevelly* and *Madura* to ascertain the rule of succession "as regards Sons by different Wives," and appears from the Collector's Letter to the Secretary of the Board, that the opinions of twenty *Zemindars* and *Poligars* were collected, copies of which he sent, giving also at the same time, an abstract of them in his Letter. It seems that the Court of Wards acted upon the opinions thus obtained.

The only evidence offered of these opinions was the above Letter and abstract of the Collector, and objections were made to its reception in proof of the custom.

Considerable, and perhaps undue, laxity in admitting documents has been sometimes allowed by the

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Indian Courts; but their Lordships consider that whilst it may not be desirable, in all cases, to apply strict and technical rule to the admissibility of evidence in the Courts in *India*, the substantial principles on which the authenticity and value of all evidence rest, should be observed. One of these principles is, that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. There seems to be no reason in this case why the *Zemindars* or some of them might not have been called as witnesses, when, of course, they would have been subject to cross-examination; but not only were none examined, but even their written opinions, as they gave them, were not produced. Their Lordships considered, agreeing with the High Court, that the only evidence offered, viz., the Collector's Letter and summary, was not properly admissible, and if received, could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district.

The summary of the Collector (if it may be looked at) discloses that the *Zemindars* were not unanimous in their view of the custom; and it further appears, that their opinions were given with reference to the succession to a *zemindary* in a family of a different caste. The late *Zemindar*, who was one of those vouched, differed from the majority, and declared that the eldest Son, although by the junior Wife, would succeed. It is true that, for the reasons already given, much reliance cannot be placed on his statement, but, so far as it may be of any value, it negatives the alleged custom at all events as one prevailing in his own caste and *Zemindary*.



It was insisted by the learned Counsel for the Appellant that the fact that the priority of the marriages of the second and third Wives was made a question in the declaratory suit and in this suit, and strongly contested, indicated an impression on the minds of the litigants that a custom existed to the effect alleged by the Appellants, for if there were no such custom, the contest as to the priority of the marriages was immaterial. At first sight this seemed to be so. But the inference from it is greatly weakened, if not destroyed, by the consideration that in the declaratory suit brought in the *Zemindar's* lifetime, and to which he was a party, the *Zemindar* himself, contrary to his former view, set up the custom which would give the succession to the Appellant, whom he was then supporting, in opposition to the Respondent, his eldest Son. When the Father, from whatever motive, put forward this view of the custom, it was natural that the fact of the priority of the marriages should be made a question in the suit, as well as the nature of the custom.

The attempt on both sides to prove a special custom having failed, it remains to consider what is the general Hindoo law applicable to this disputed succession.

The case stands in this respect in the same category as that in the appeal relating to the *zemindary* of *Shivagunga*, which was decided by this Board in 1863 (a). Their Lordships, in giving judgment in that appeal, say : " The *zemindary* is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of a family at

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(a) *Katama Natchiar v. The Rajah of Shivagunga*, 9 Moore's Ind. App. Cases, 539.



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a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings) the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of *India*, with such qualifications only as flow from the impartible character of the subject" (a). Such, also, must be the rule of succession to be applied in the case now under appeal.

The High Court, in their judgment in the present case, declare that "no work of authority or decision" had been cited or found directly giving the rule of descent. That this should be so may, perhaps, be explained by the fact, that succession by primogeniture is the rare exception to the ordinary rule in Hindoo families taking place only upon the descent of some impartible subject, as a *Raj* or office, and that in most cases of the kind there has probably been found some local or family usage regulating such descent.

If, however, it really be that the rule of succession is not directly declared in Books of authority, or in decided cases, then it must be deduced from those rules which are settled, and the principles on which they are founded.

The learned Counsel on both sides referred to various texts with this view; and it appears to their Lordships that many of these supply authority from which the law may, with reasonable certainty, be inferred and declared.

One great rule of religion binding upon every Hindoo, is the duty of having a Son, not only for the

(a) *Katama Natchiar v. The Rajah of Shivagunga*, 9 Moore's Ind. App. Cases, 588.



sake of the spiritual benefits he obtains for himself by his birth, but because, he thereby discharges the pious debt he owes to his ancestors. And, as a consequence naturally flowing from this law, the first-born Son is, throughout the Books of authority, treated as pre-eminent amongst his Brothers, and held to be entitled to many special privileges.

It will be found, from numerous authorities and instances, that, although the Father's property, by the general rule, descends upon all his Sons, yet, whenever it becomes necessary to make a distinction, precedence is given to the first-born.

Thus, *Menu*, after laying down the cardinal rule of succession that Brothers divide the paternal property among them, adds "The eldest Brother may take entire possession of the patrimony; and the others may live under him, as they lived under their Father, unless they choose to be separated" (ch. IX., sect. 105).

"By the eldest, at the moment of his birth, the Father having begotten a Son, discharges his debt to his own progenitors; the eldest Son, therefore, ought, before partition, to manage the whole patrimony" (ch. IX., sect. 106).

"That Son alone, by whose birth alone he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty" (ch. IX., sect. 107). See also sects. 137, 138.

Many of the precepts of *Menu* have been undoubtedly altered and modified by the modern law and usage; but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law. The general doctrines above alluded to are also found in other old authorities, and are treated as part of the

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foundation of the Hindoo law of succession by modern Writers and compilers. (See 1 *Strange's* "Hindu Law," p. 192. *Colb. Dig.*, B. V.)

It is true that these doctrines occur in passages treating of divisible inheritances; but the presumption from them is irresistible, that in the case of an inheritance which is from its nature indivisible, and can, therefore, go to one only of several Sons, the first-born by reason of his general pre-eminence, should be preferred to his younger Brother.

It was not disputed that this would be so in the case of several Sons by the same Mother; but it was contended that, where there were Sons by different Wives the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the Sons by any Wives after the first. On the contrary, there is a good deal of authority pointing to the conclusion that there is no distinction, except seniority of birth, amongst the Sons of Wives of the same caste and class.

Thus *Menu* says, "a younger Son being born of a first married Wife after an elder Son had been born of a Wife last married, but of a lower class, it may be a doubt in that case, how the division shall be made." (Ch. IX., sect. 122).

The doubt thus suggested whether, even in the case of a Wife of a lower class, there would be inequality of division amongst the Sons, raises a strong presumption that there would be none where the Mothers were of the same class. But the matter does not rest on presumption, for the 125th section runs thus:—

"As between Sons born of Wives equal in their class, and without any other distinction, there can be



no seniority in right of the Mother; but the seniority ordained by law, is according to birth."

It is true the Writer is, in this section, treating of partible successions, but he is at the same time proclaiming the privileges to which the eldest Son is entitled, and one of them he had just declared in a preceding section (119) thus:—

"Let them never divide the value of a single Goat or Sheep;—a single Goat or Sheep, remaining after an equal distribution, belongs to the first-born."

Now, when it is said, that the single Goat or Sheep is to belong to one Son, it is apparently for the same reason that a *zemindary* so descends, viz., that the subject is in its nature impartible; and, therefore, the rule that is laid down with reference to one impartible subject, viz., that "it belongs to the first-born," appears by reasonable and just implication to be the rule applicable to all such subjects. And which of several Sons is to be deemed the first-born is declared by section 125 above cited, "there can be no seniority in right of the Mother, but the seniority ordained by law, is according to birth."

It appears to their Lordships, that the rules just cited approach very nearly to a distinct declaration of the general Hindoo law upon the question, when regarded apart from any special custom prevailing in a particular District or family.

Great reliance was placed, during the argument, on the admission supposed to have been made, that the Son of the first Wife would succeed before an elder Brother by a subsequent Wife, and it was contended that, by analogy, the Son of the second Wife must be entitled to the like precedence over the Son of the third. There are, undoubtedly, authorities

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which show, that the first Wife occupies a position of honour, and precedence above all others, but it is not necessary for their Lordships to decide, whether the admission made in this case is in accordance with general Hindoo law; for supposing the law to be so, no just analogy can be established between the *status* of the first Wife and that of any subsequent Wife. Her title to special rank and privileges rests upon grounds peculiar to the first Wife, and which can have no application to others. (See *Strange's* "Hindu Law," Vol. I., pp. 55, 56 [2nd Ed.]). The reasons upon which she alone of all Wives is entitled to peculiar honour and privileges, rather point to the conclusion, that the Wives subsequently married, if of the same caste and class, are on an equal footing.

It is right to observe that, if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favour of the right of the first-born Son. The inheritances of Hindoos which descend on a single heir, are almost entirely confined to *zemindaries* in the nature of a *Raj*, and to offices (see "*Norton's* Leading Cases," Part I., p. 278), and it is obviously in accordance with reason and convenience, that such successions should devolve upon the Son who would, in natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind. But their Lordships do not find it necessary to place their decision on these grounds; they are of opinion, that upon the principles of law deducible from the authorities, the judgment of the High Court is correct, and ought to be upheld.

It appears that the decision under appeal has been followed by the High Court of *Bombay*, *Bhujangra'v*



*bin D. Ghorpade v. Malojira bin D. Ghorpade* (5 Bom. High Court Reports, 161).

Their Lordships are glad that they are able to come to a conclusion which will not disturb the rule of succession declared by the concurrent judgments of the High Court in two Presidencies; and they will, in this case, humbly advise Her Majesty to affirm the judgment of the High Court of *Madras* and to dismiss this appeal with costs.

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SHAM CHAND BYSACK ... *Appellant*;

AND

KISHEN PROSAUD SURMA alias RAJA } *Respondent.\**  
BABOO ... }

*On appeal from the Sudder Dewanny Adawlut at Calcutta.*

THIS suit (being one of three suits based on similar grounds of action) was instituted by the Appellant against the Respondent, to recover possession of a *chur* (alluvial land), as appurtenant to a *Talook*, called *Meer Syud Mahomed*, in which *Talook* the Appellant had as proprietor a share. He claimed the

\* Present :—Members of the *Judicial Committee* :—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

16th, 23rd &  
26th March,  
1872.

Two riparian proprietors of land on opposite sides of a River, respectively claimed *churs* which had been diluviated for a great many years, and afterwards

re-formed by a change of the course of the River, as belonging to their respective estates. After a police inquiry, the Magistrate, in 1836, put A. in possession. B., the other riparian proprietor, took no steps till the year 1847 to obtain possession of the *churs*. Held (1), that the long delay in bringing a suit raised a presumption against A.'s title, and (2), that he had failed to identify the *churs* as having been formerly part of his lands or an accretion thereto.



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lands on the ground, that the same were a re-formation, and had reappeared on the original sites of the northern portion of a *chur* named *Goag* and of the whole of *chur Bhedur*, as formerly appertaining to that *Talook*, both of which *churs* he alleged had been covered with water, and for a time had disappeared by the action of the united streams of the two Rivers *Dhuneesurree* and *Booreegunga*; and that his predecessors had been dispossessed of the lands of the two *churs*, after their re-formation and reappearance, by the *Darogah* of the adjoining *Thannah* on the 21st of *May*, 1835, acting under the Order of the Revenue Commissioner of the District, and at the instance of *Gopal Pershad*, the Father of the Respondent, who had been put in possession under a Magistrate's Order.

The appeal was brought from a Decree of the late *Sudder Dewanny Adawlut*, dated the 31st *January*, 1861, which reversed a Decree of the Principal *Sudder Ameen* of *Zillah Dacca*, dated the 8th of *March*, 1858, raised three questions—first, whether the lands formed part of the two *churs*, *Bhedur* and *Goag*, and appertained to the Appellant's *Talook*, called *Meer Syud Mahomed*, as contended by him; or whether the lands formed part of the Respondent's *Talook*, *Bucktbully*, as insisted by him; secondly, whether the High Court were right in deciding the case was one falling within sect. 4, cl. 1, of *Ben. Reg.*, XI. of 1825, as both the Appellant and the Respondent had treated the case as one of reappearance or re-formation of land on its original site or sites, after having been submerged for a time by the waters of the two above-mentioned Rivers; and thirdly, whether the Appellant had established by evidence, that the re-for-



mation of the lands had taken place on the original sites of the *churs*, *Bhedur* and *Goag*.

By the decree of the Principal *Sudder Ameen* of *Zillah Dacca* (*Mouloy Mahomed Nazim Khan, Bahadoor*), he held that a *Khal* or channel called the *Coomariabhangha Khal* was the boundary between the Appellant's *churs*, *Bhedur* and *Goag* on the south, and the Respondent's *Talook Buckthully* on the north; and that the Appellant had proved that his predecessors had held possession of the lands in dispute up to the year 1836, when they were dispossessed by the Order of the Magistrate, and decreed the Appellant possession of the *churs*.

On appeal, the *Sudder Dewanny* Court, composed of Messrs. *Trevor, Loch, and Steer*, found that the lands were an accretion and increment to the lands of the Respondent; and held that the Appellant had failed to prove that the lands were an increment to the estate in his possession, and that the Appellant's claim was, under the provision of sect. 4, cl. 1, of *Ben. Reg.*, XI. of 1825, untenable; and reversed decision of the Lower Court; dismissing the suit with costs.

The appeal was from this Decree.

As the Respondent did not appear the appeal was heard *ex parte*.

Mr. *Leith*, for the Appellant,

Contended, first, that the Court below was wrong in treating the case as one of gradual accretion within the provisions of cl. 1, sect. 4, of *Ben. Reg.*, XI. of 1825; and secondly, that the Appellant's Witnesses had established his title to the *churs* as re-formed land, and was entitled under cl. 5 of sect. 4 of that

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Regulation. He cited and commented on the cases, *Mussumat Imam Bandi v. Hurgovind Ghose* (a); *Sree Eckowrie Sing v. Heeraloll Seal* (b); and *Lopez v. Muddun Mohun Thakoor* (c); *Katteemonee Dossee v. Ranee Monomhinee Dabee* (d).

The Right Hon. Sir ROBERT COLLIER :—

This is a dispute between two riparian proprietors, holding estates respectively on the opposite sides of an Indian River, concerning certain *churs* formed in the course of that River, each landed proprietor maintaining that he was entitled to those *churs*, as appertaining to his estate.

The case of the Plaintiff was, in substance, that he was the Owner of a *Talook* called *Meer Syud Mahomed*, together with certain other persons of the surname of *Chowdry*; that his ancestors, by reason of their possession of this *Talook*, were entitled to two *churs* in the channel formed by the junction of the two Rivers, the *Booreegunga* and the *Dhuneesurree*; that those *churs*, one named *Goag*, otherwise *Kodalia*, and the other *Bhedur*, were, what is called diluviated, that is, covered by water, some fifty or more years ago. *Chur Goag* was said to be diluviated in a great measure, though not wholly (indeed, it has never been quite diluviated), as long ago as the year 1814. The other *chur*, *Bhedur*, was diluviated sometime about the year 1817 or 1818. The case of the Plaintiff was, that those *churs* had gradually reappeared, chiefly owing to a change in the course of the River; in fact that, they had re-formed upon their

(a) 4 Moore's Ind. App. Cases, 403.

(b) 12 Moore's Ind. App. Cases, 136.

(c) 13 Moore's Ind. App. Cases, 487.

(d) 3 W. R. 51.



original sites not many years after they were diluviated ; and he gave evidence of measuring, from time to time, those *churs* as they reappeared and of exercising acts of ownership upon them. Among other acts of ownership, he gave evidence of a Lease granted by the *Chowdhys*, who were co-shareholders with him in the *Talook*, *Meer Syud Mahomed*, to a person of the name of *Dowcett*, in 1829, for a term of five years, and that *Dowcett* cultivated Indigo upon a portion of the *locus in quo*. It is to be observed, however, that there is evidence on the other side, of *Dowcett* having taken the precaution of also obtaining a Lease from the proprietor on the opposite bank.

According to the Plaintiff's evidence, he was in as complete possession as the subject-matter admitted of, at all events up to the year 1832, when this litigation with the riparian proprietor on the other side of the River, who owned *Talook Bucktbully*, commenced.

It is not necessary to refer to the proceedings which took place before the Magistrates from the year 1832 to 1835, further than to state their result, which appears to have been this :—The Plaintiff, or rather those under whom he now claims, were put into possession of *chur Goag*, or, at all events, a portion of *chur Goag*, and they have remained in possession of that portion from that time to this. But, in the year 1835, an Order was made by the Magistrate for putting the Defendant's Father, *Gopal Pershad*, in possession of *chur Bhedur*. Actual possession would appear to have been delivered in 1836, and *Gopal Pershad* and his Son, the present Respondent, have remained in possession of *chur Bhedur* from that day to this.

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The Plaintiff having been dispossessed, as he alleges, in the year 1836, of *chur Bhedur*, did not institute this suit for the purpose of recovering that possession until the year 1847. He does indeed make some attempt to explain this delay by standing, that in the interim, a resumption suit was instituted in respect to those lands. As to the proceedings in that suit, it is not necessary for the present case to refer to, more than this, that the proprietor of *Talook Bucktbully*, on the opposite side of the River, appears to have instituted a proceeding against the Government, with a view of obtaining possession of the lands in dispute, and some more, upon payment of the Government revenue. As to a portion he succeeded; that he now occupies, and in respect of that portion there is no dispute. As to lands now in question, he failed; and undoubtedly the Collector did find, that the Plaintiff was entitled to those lands. That decision, however, was subsequently set aside on the ground, that the Collector had no jurisdiction to make it, his jurisdiction being confined to determining the questions which arose between the Owner of *Bucktbully* and the Government, and not extending to deciding on the conflicting claims of other Landowners.

It appears also, that in the interim between 1836 and the institution of this suit, there was some family suit with respect to this property. Their Lordships, however, are of opinion, that no sufficient explanation had been given for the very long delay on the part of the Plaintiff in instituting this suit. If some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this description, the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time.



The hardship may be great of calling upon persons who have been long in undisturbed possession of such property for strict proof of their title after landmarks may have been washed away or witnesses may have died ; indeed in this case it would appear that *Gopal Pershad*, the then Owner, died before the institution of this suit, and possibly *Gopal Pershad's* evidence might have been of an important character, which his Son could not supply.

But the delay in the institution of this suit is not the only delay with which the Appellant is chargeable, for the Decree in this suit was pronounced so long ago as the year 1861 ; the appeal was brought in 1862 ; and in 1863 the record was lodged. Some years afterwards, in the year 1868, the Appellant filed a supplemental record, but he did not lodge a case until the year 1871, so that there has been a delay of nearly ten years wholly unexplained in the prosecution of this appeal.

The case stands thus : the Appellant seeks to oust from possession persons who have enjoyed this property from the year 1835 to the present time, and for nearly twenty years of that delay he is responsible. Under these circumstances their Lordships certainly require to be satisfied by clear proof of the grounds which he alleges for disturbing a possession of such long continuance.

This suit began in the year 1847, and it lasted to the year 1861. It is not necessary to refer at length to its history. It may be enough to say, that at an early stage, in the year 1848, a local investigation was held by an *Ameen* of the name of *Monier*, which appears to have resulted in favour of the Plaintiff. Subsequently to that there was a hearing in 1850,

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before the Principal *Sudder Ameen*, who decided against the Plaintiff, upon the ground of the Act of Limitations. The case on appeal was sent back to be re-heard, in order that the grounds of that judgment might be more clearly stated. It was again heard in 1852, and again decided against the Plaintiff, on the plea of the Act of Limitations ; the Principal *Sudder Ameen* at the same time expressing a somewhat strong opinion against the Plaintiff's case generally. Subsequently the case was again sent back to be re-heard upon the merits ; and previous to its re-hearing upon the merits ; another local investigation was ordered before the *Moonsiff* of *Naraingunge*, which took place on the 30th of *January*, 1858, whereupon the report of the *Moonsiff* was against the Plaintiff. The Principal *Sudder Ameen*, on the hearing of the cause, set aside the *Moonsiff's* report, which he considered unsatisfactory, and decided substantially all the issues in favour of the Plaintiff. The case then came on for appeal before the High Court, and it is against this judgment that the present appeal is lodged.

It has been contended, that the *Sudder Court* mistook the law as applicable to this case, and their decision is in contravention of two cases, *Mussumat Imam Bandi v. Hurgovind Ghose* (4 Moore's Ind. App. Cases, 403), and *Sree Eckowrie Sing v. Heeraloll Seal* (12 Moore's Ind. App. Cases, 136), in which their Lordships have laid down the principles applicable to cases of this description. If their Lordships could see clearly, that the High Court had acted in contravention of the principles laid down in those cases, they would have thought it their duty to set aside the decision appealed from ; but it appears to their Lord-



ships impossible to suppose that the High Court could not have been acquainted with the first of those cases, reported so long ago, in 4th of Moore's Indian Appeals; and on looking at the judgment, although there are some expressions in it which may give some colour to the contention of the Appellant, it does not appear to their Lordships that the High Court have, in the reasons of their decision, acted in contravention of either of the above decisions. It appears to their Lordships, that the judgment must be taken to have proceeded mainly upon the ground, that the Plaintiff had not succeeded in proving that the spot which he claimed was identical with that of the *chur* which he alleged to have been diluviated.

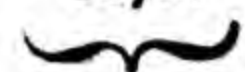
Whether the second clause of the fourth section of *Ben. Reg.*, XI. of 1825, applies, or whether the fifth clause of the same section applies, which is in general terms and to this effect, that in all cases not previously provided for, and in all cases of claims and disputes respecting land gained by alluvion or by dereliction of a River or the Sea, which are not specifically provided for by the rules of that Regulation, the Courts of justice, in deciding upon such claims and disputes, is to be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case; or if not, by general principles of equity or justice; in either case, it is equally essential for the maintenance of the Plaintiff's case that he should establish the identity of the land which he has lost.

Their Lordships think, that on the face of the judgment it appears, that this consideration must have been present to the High Court and they read their finding, "that there were not any marks by

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which the lands can be identified as having at any time formed part of the estate of the Plaintiff," not as intimating (as it has been contended) that proof was necessary of the existence of some specific landmarks; but as a general finding on the part of the Court that the lands had not been identified; and if so, undoubtedly there was an end of the Plaintiff's main case. But, further, it would appear from the judgment, that the Plaintiff, possibly feeling that, in the opinion of the Court, he had not established the identity of these lands as re-formed lands, contended that he was entitled to them as accretions to that land which was undoubtedly in his possession; for, in the judgment of the Court it is said: "But he [the Plaintiff] urges, that being in possession of part of the *chur* as the *Goag* under a decree of a competent Court, which has become final, the rest of the *chur* lands must be considered an increment to that village." The Court disposed of that argument by stating their opinion that, if the lands in question had formed to the south of the portion which was in possession of the Plaintiff, then there might have been good grounds for this contention, but not so as they were alleged to have formed to the north. They thus disposed of the question of accretion, which certainly seems to have been raised, and, to a certain extent, dwelt upon, by the Plaintiff.

Under these circumstances, their Lordships, whatever might have been their view, if this matter had come before them as a Court of first instance, see no sufficient grounds for disturbing the finding of the High Court, which was to the effect, that the Plaintiff has failed to prove his case, that he has not proved the lands which have re-formed, if lands have re-



formed in the bed of the River, to have been the same as those which belonged to his predecessors and had been diluviated; and that he has failed also to prove his title upon the ground of the *locus in quo* being an accretion to any lands of which he is possessed.

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On these grounds their Lordships will humbly advise Her Majesty that this appeal be dismissed.

THE GENERAL MANAGER OF THE  
RAJ DURBHUNGA, under the } *Appellant*;  
Court of Wards ... }

AND

MAHARAJAH COOMAR RAMAPUT } *Respondent.\**  
SING ... }

*On appeal from the High Court of Judicature at  
Fort William in Bengal.*

THE facts which gave rise to this appeal were these :—

20th & 21st  
March,  
1872.

° Present :—Members of the *Judicial Committee* :—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

In a suit by  
A. against B.  
for arrears of  
rent, a Decree  
was obtained  
by A. against

B.'s Widow; B. having died pending the suit. Under this Decree execution was obtained, and the interest of the Widow was sold under Act, No. XI. of 1859. The amended Certificate stated, that the estate was sold by virtue of the Decree. Held, reversing the Decree of the High Court, and following *Johan Cunder Mitter v. Buksh Ali Soudagur* (Marshall's *Ben. App. Cases*, 614), that the sale was not of the Widow's personal interest, but as the representative of her Husband's estate.



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The Respondent and Appellant had both obtained separate Decrees in respect of arrears of rent due to them respectively by one *Gourpershad*, deceased. They had both taken out execution of their Decrees after his death, and the Appellant had, at an execution sale, purchased the lands in dispute, against which the Respondent in this suit sought to execute his Decree, notwithstanding the sale to the Appellant, on the ground that the Appellant had acquired, by his purchase, not the interest of the heir, *Hurpersad*, the son of *Gourpershad*, but only the interest of his Widow, *Chooharoo Kooer*, which really was nothing, and that, therefore, Respondent was entitled to sell, in execution of his Decree, the interest of the heir.

It appeared, that on the 11th of *November*, 1858, the Respondent obtained a Decree against *Gourpershad* for Rs. 14,636 for arrears of rent, which Decree was affirmed by the *Sudder Dewanny* Court in 1861. *Gourpershad* died about that time.

In the year 1862, the then Manager of the *Durbhunga Raj* brought a suit under Act, No. X. of 1859, against *Chooharoo Kooer*, as the Mother and Guardian of *Hurpersad*, then a Minor, to recover Rs. 11,820. 15a. 7p. for arrears of rent due from the deceased *Gourpershad* in respect of lands held by him of the *Durbhunga Raj*.

*Chooharoo Kooer* by her answer alleged, that *Hurpersad* had no interest in his Father's estate, as he had been adopted into another family, whose estate he had come into possession of, and that she was in possession of her Husband's estate.

An issue having been raised on this point, the Collector held, that *Hurpersad* was exempted from liability as he had been adopted in another family,



and finding the amount of rent to have been due from *Gourpershad* to the Plaintiff (to whose position and rights the Appellant succeeded) decreed him the sum of Rs. 12,868. 1a. 10p.

The Respondent having sought execution of his Decree against the Widow and Son of *Gourpershad*, *Hurpershad* objected to his being made personally liable, on the ground that no estate of his Father had come to him, and that all had come to the possession of *Chooharoo Kooer*, and the Principal *Sudder Ameen* of *Tirhoot*, on the 16th of *May*, 1863, sustained that objection.

As neither of the Decree-holders could obtain satisfaction of their Decrees, the then Manager of the *Durbhunga Raj* on the 13th of *April*, 1865, instituted a suit in the Court of the Principal *Sudder Ameen* of *Tirhoot* against *Hurpershad*, as Son and heir, and *Chooharoo Kooer* as Widow of the deceased *Gourpershad*, and another, to establish his right to execute his rent Decree against the properties mentioned in the plaint; and the Plaintiff sought to have it established that the properties against which he sought to execute his rent Decree formed part of the estate of *Gourpershad*, and were liable to satisfy that Decree.

The Principal *Sudder Ameen* found that the properties in question had in fact come to *Gourpershad* by inheritance, and after his death had devolved from him on *Hurpersad*; that *Chooharoo Kooer*, by *Mithila* law, had no interest in them, and ordered that the estates in suit being considered as left by *Gourpershad*, the judgment-Debtor, be put to sale according to the last Order contained in the decision, under Act, No. X. of 1859, dated the 24th *November*, 1862, in

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satisfaction of the Decree obtained by the Plaintiff. This Decree was affirmed by the High Court (a).

On the 19th of *June*, 1867, the Appellant applied to the Collector for execution of his Decree of the 24th of *November*, 1862, against the properties which had been decided by the Principal *Sudder Ameen*, in his judgment, to have formed part of the estate of *Gourpershad*; and the Collector attached and notified the sale of the properties in execution of the Appellant's rent Decree, and on the 27th of *November*, 1867, the same having been put up to public sale by the Collector, were knocked down to the Appellant as the highest bidder, and Certificates were, on the 10th of *January*, 1868, given to him as Purchaser.

These Certificates certified the purchase by the Appellant of the various *Mehals* by name, and stated that—"In this *Mouzah*, the right and interest of *Mussumat Chooharoo Kooer*, Defendant, judgment-Debtor, has been sold by auction, in satisfaction of the Decretal amount under Act, No. X. of 1859, due to the Court of Wards on behalf of the *Dur-bhunga* estate, Plaintiff Decree-holder."

On the 13th *May*, 1868, on the application of the Appellant, the following addition was made to the Certificates—"Be it known that the estate mentioned in this Certificate has been sold by auction, by virtue of the Decree passed by the Principal *Sudder Ameen* of this District, dated the 23rd of *January*, 1866."

The Respondent took no steps to obtain execution of his Decree after his unsuccessful attempt in *May*, 1863, until the middle of the year 1867. He then applied for execution against *Hurpersad*, and against

(a) See 7 W. R. p. 500.



the estates which had been declared by the Principal *Sudder Ameen* and High Court, to be liable to sale in satisfaction of the Decree obtained by the Manager of the *Durbhunga Raj*.

To this the Appellant obtained, and in the end the Principal *Sudder Ameen*, on the 18th of *May*, 1868, allowed the Appellant's objection, and held that as the Appellant had previously attached and brought to sale, and purchased those estates in execution of his Decree, they could not be again attached in execution of the Respondent's Decree.

Upon this the Respondent instituted the present suit, on the 7th of *August*, 1868, against the Appellant and *Hurpersad*, to have his right declared to sell the interest of *Hurpersad*, to whom, he contended, the lands had come, as being Son and heir of *Gourpershad*, and alleged that the Appellant had at the sale purchased nothing but the interest of the Widow, *Chooharoo Kooer*, who had no right therein.

The Appellant, in answer, contended that, by the sale to him, in execution of his rent Decree, and in pursuance of the Decree of the Principal *Sudder Ameen* and the High Court, the interest which had been of *Courpershad* had come to him.

On the 9th of *December*, 1868, *Babo Bhooputty Roy*, the Subordinate Judge of *Tirhoot*, dismissed the Plaintiff's suit with costs. He held that the proceedings against *Chooharoo Kooer* were taken against her in her representative capacity only, and so bound her Husband's estate, and that the effect of the Decrees obtained by the *Durbhunga Raj* from the Principal *Sudder Ameen* and the High Court, was not to make *Hurpersad* personally liable, but to declare that his

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Father's properties which had come to his possession were liable for that Father's debts, and, as to the contention, that the Appellant had ultimately sought execution against *Chooharoo Kooer* alone, the decision was governed by the case of *Johan Chunder Mitter v. Buksh Ali Soudagur* (Marshall's Ben. App. Cases, 614), and that the sale was to be considered as of her interest, not personally, but as the representative of her Husband's estate.

From this judgment the Respondent appealed to the High Court, and a Division Bench of that Court, composed of the Justices *Kemp* and *Glover*, on the 28th of *May*, 1869, reversed the judgment of the subordinate Judge, and declared the Respondent entitled, in execution of his Decree, to sell the rights and interests of *Hurpersad*, as representative of the estate of *Gourpershad*, the original judgment-Debtor, unless his Decree was satisfied prior to the sale. The Court held, that the effect of the Decree obtained by the *Durbhunga Raj* Manager was to establish that *Hurpersad* was his Father's heir, and that consequently the Plaintiff was entitled to execute his Decree against the property in his possession, unless it had passed out of his possession by the previous execution. That, as the Appellant had executed his Decree, not against *Hurpersad*, but against *Chooharoo Kooer* personally, and not in her representative character, he had in fact taken nothing by his purchase, and the Court was of opinion, that the case above referred to did not apply, as there the debt which formed the subject of the Decree against the Widow of the deceased Obligor was his debt, though the Decree was obtained against the Widow during



the minority of her Son, while in the present case, the Decretal Order did not show that the debt was *Gourpershad's*, on the contrary, that the Decree was against *Chooharoo Kooer* alone, and that there was nothing to show that the Decree was against her in her representative character.

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The appeal was from this Decree.

Sir *R. Palmer*, Q.C., and Mr. *Doyne*, for the Appellant.

This Decree cannot be maintained. It is contrary to the decision of the High Court in the case of *Johan Chunder Mitter v. Buksh Ali Soudagur* (a), which is a true exposition of the principle relating to a Widow's interest, which decision has been followed by the Courts in *India*, and is on all fours with the facts in this case. The debt which formed the subject of the Appellant's rent Decree, was the debt of *Gourpershad*, and the Decree against his Widow, was in her capacity as representative of the estate, and not against her personally, as she was not liable for her Husband's debts. No question has been raised as to the justness of the Decree, and the vexatious opposition to its enforcement was wholly unjustifiable. The execution was in pursuance of the Decree. Under the sale the estate and interest which had been *Gourpershad's* passed to the Appellant as Purchaser.

Mr. *Leith*, for the Respondent.

The Appellant in execution of his money Decree specifically advertised and put up for sale the right and interest of *Chooharoo Kooer* in her Husband's

(a) Marshall's Ben. App. Cases, 614.



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estate, and nothing more, and having as judgment Creditor become Purchaser at the sale he cannot claim under his purchase anything more than was sold to him, and only such was conveyed to him by the Certificates of the Collector. The Court was right in holding the Appellant strictly to the terms of his purchase. Such sale confined the amount of the purchase-money to the interest of the Widow. If the interest of the heir, *Hurpersad*, had been also sold, a sum might have been obtained sufficient to have paid the judgment debts of the Respondent as well as of the Appellant. The Respondent as a judgment Creditor of *Gourpershad*, having previously obtained an Order of Sale, is entitled to the benefit of his attachment and sale of the right and interest of *Hurpersad* to realize the amount of his Decree.

Without calling for a reply,

Their Lordships delivered judgment by

The Right Hon. Sir JAMES COLVILE:—

These proceedings certainly illustrate what was said by Mr. *Doyne* and what has been often stated before, that the difficulties of a litigant in *India* begin when he has obtained a Decree. When, however, the actual question which is at issue between the Appellant and the Respondent on this appeal is eliminated from the rest of the record, it does not appear to their Lordships to present any very great difficulty.

The Appellant and the Respondent had each, it must be assumed, a good claim against the estate of the deceased, *Gourpershad*. The Respondent had obtained a decree according to the practice then



existing in the Civil Court in the lifetime of *Gourpershad*. The Appellant, pursuing his remedy for rent under Act, No. X. of 1859, in the Collector's Court, had obtained a Decree for the arrears of rent in respect of which he sued against *Chooharoo Kooer*, as the Widow of *Gourpershad* and the Guardain of her infant Son *Hurpersad*. It was a suit brought against those who were supposed to be the representatives of the Debtor, *Gourpershad*. In that suit the case set up by the Defendants was, that the infant was not the heir of his Father; that he had been adopted into another family, and that consequently the Widow was the sole heiress and representative. The Decree was against the Widow in that capacity. It declared that the Son was not liable, and ended with a declaration, which clearly pointed to the realization of the demand out of the estates of the deceased, *Gourpershad*, and showed that the decree was made against the person supposed to be the heir and representative of *Gourpershad*. Other difficulties being interposed in the way of executing that Decree, the Respondent thought it necessary to go to the *Zillah* Court in order to get rid of certain Deeds as well as of the alleged *kritima* adoption of *Hurpersad*, the Son, and he succeeded in obtaining a Decree, which was afterwards affirmed by the High Court, the result of which may be taken to be to affirm that *Hurpersad* was the heir of his natural Father. The execution of the Collector's Decree had in the meantime been suspended. When the Decree of the Civil Court became final, an intimation was sent to the Collector that the stop Order which had been put upon the execution should be removed, and that the execution might go on. Execution of that Decree

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was accordingly had under the conjoint provisions of Act, No. X. and Act, No. XI. of 1859, and perhaps, it is owing to the operation of those Acts, and in particular to the fact, that the execution took place under Act, No. XI. of 1859, by putting up the property for sale in the same way that an estate would be sold for arrears of revenue, and not proceeding under the Civil Code Act, No. VIII. of 1859, that some of the confusion and difficulties which have taken place in this case have arisen. However that may be, the estates in question were sold under the Collector's Order, and purchased by the judgment Creditor. That took place in *November*, 1867. In the meantime certain proceedings had taken place in the suit of the Respondent. The Respondent had originally applied for execution of his Decree obtained in the lifetime of *Gourpershad* against the Widow and the infant Son. He was met by the same allegation that had been made in the Appellant's suit, that *Hurpersad* had no interest in his Father's estate, and a miscellaneous Order was made, which held that *Hurpersad* was not liable for his Father's debt, and treated the Widow as the sole representative. Afterwards the Respondent attempted to get the benefit of the Decree which had been obtained by the Appellant, and to proceed against *Hurpersad*, and on that occasion the Appellant intervened as an Objector. The Judge disallowed the objection, but at the same time, held that the former execution proceedings were invalid, and directed them to be struck off the file. The Respondent then commenced other proceedings against *Hurpersad*, and although there was no formal discharge of the miscellaneous Order, the Judge appears to have con-



sidered that as swept away with the former execution proceedings and no longer operative, and directed a sale in execution, which, if there were nothing else in the way of it, would probably have been regular against *Hurpersad* as the heir of his Father. However, when the Respondent was proceeding to carry out that Order, the Appellant came in and objected that the estates had already been sold under his Decree, and had been purchased by him, and that in fact they could not be any longer sold as the estates of *Hurpersad*. That objection prevailed, and the result was that the Respondent's only remedy was to bring the regular suit out of which this appeal has arisen.

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From the above statement it is clear, that unless there be some fatal irregularity in the mode in which the Decree of the Appellant was obtained or drawn up, or some fatal irregularity in the mode in which that Decree has been prosecuted, the estates have been regularly sold, and that the suit of the Respondent, seeking to set aside the Order for sale and to get the benefit of his own execution as against *Hurpersad* as the heir of his Father, must fail.

Their Lordships are of opinion, that no case has been made upon which they can say, that there has been that irregularity in the proceeding before the Collector and the sale which took place which would justify them in setting aside the sale, and upon that point they must differ from the Judges of the High Court. The proceedings took place under Act, No. XI. of 1859, and that Act appears to contemplate that the estate should be put up for sale, and that the person whose interest should be nominally sold should be the registered proprietor. In this



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case, so far as the proceedings show, it appears that the Widow was the registered Proprietor. But the case does not rest there, because in the certificate of sale there is a distinct reference to the Decree obtained by the Appellant from the *Zillah* Court, and, therefore, the whole proceeding, if fairly looked at, amounts to this,—that the estate of *Gourpershad* was sold under that Decree in execution for his debt, and that the interest of his Widow, the registered proprietor and ostensible Owner of the estate, and also the interest of his Son, if he had any interest, was bound by that Decree. If that be so, the question arises, whether the Respondent, the Plaintiff in the suit below, has any ground upon which he can come in and impeach the sale? It appears to their Lordships that he can claim only what interest remained in *Hurpersad*, and that substantially the proceedings would be a bar to any claim on the part of *Hurpersad*. It is unnecessary to consider, whether in any question between the Respondent and *Hurpersad*, who in this suit came in and continued to dispute his heirship, the Decree in the suit which had been obtained by the Appellant would be any binding adjudication between the Respondent and *Hurpersad*. It appears to their Lordships clearly to be a mere Decree *inter partes*, and that there is no ground for giving it the effect of a Decree *in rem*, which is the effect which a passage in the judgment of the High Court appears to attribute to it. But without going into that, it seems sufficient to their Lordships for the determination of this appeal to say, that there was in their judgment no substantial irregularity in the sale before the Collector, and that, therefore, that as between the Appellant



and Respondent, the Appellant is entitled to and cannot be deprived of the benefit which has resulted to him from his greater diligence in enforcing his demand.

Their Lordships also desire to add, that they are unable to see any substantial distinction between this case and that of *Johan Chunder Mitter v. Buksh Ali Soudagur* (a). They entirely agree in the principles expressed by Chief Justice *Peacock* in that case, and think that they govern the present case.

The result, therefore, must be that their Lordships will humbly recommend to Her Majesty that this appeal be allowed, the judgment of the High Court reversed, and the judgment of the Lower Court affirmed. The costs of the appeal will, of course, follow the result, and the Appellant will be entitled to the costs of the appeal in the Court below.

(a) Marshall's Ben. App. Cases, 614.

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ACCOUNT.

*See* "Contract."

"MORTGAGE," 4.

ACCRETION.

*See* "ALLUVION."

ACTION.

*R.* brought a suit against certain parties in possession and the tenant for life to set aside the alienations made by the Widow of *D.* and her Mother-in-law, who, on the death of the Widow, was in possession as the Widow's heir. *R.* afterwards brought another suit against the Mortgagees in possession, claiming under the Widow to set aside the mortgage which formed part of the lands he sued for in the previous suit, as having been made against different persons, of a distinct nature, and for different relief. Held, that sect. 7 of Act, No. VIII. of 1855, did not

apply, as it was not a splitting suit or the same cause of action. [*Rao Kurun Sing v. Nawab Mahomed Fyz Ali Khan*] ... 187

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*See* "BENGAL REGULATIONS."

No. VI. of 1858.

*See* "ARREARS OF RENT."

No. VIII. of 1859, sect. 205.

*See* "CONSTRUCTION," 1.

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No. VIII. of 1859, sects. 248, 272, 286.

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No. XIV. of 1859, sects. 18 & 20.

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No. XVI. of 1865.

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No. XX. of 1866, cl. 2, sect. 17.

See "REGISTRATION," 2.

#### ADOPTION.

A Hindoo Testator by his Will gave authority to his Widow, with the consent of his Mother, to adopt a Son; in pursuance of which a Son was adopted, and the other provisions of the Will acquiesced in by the family for twenty-seven years, when a suit was brought by one of the Testator's heirs claiming the estate then in possession of the adopted Son, on the ground that the adoption was invalid. Held (reversing the decree of the High Court at Calcutta), that although the De-

fendant was bound to prove his title as adopted Son, as a fact, yet from the long period during which he had been received as adopted Son, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party, who had a right to question the legitimacy, where the Defendant, in order to defend his *status*, is allowed to invoke against the Claimant every presumption which arises from long recognition of his legitimacy by members of his family; and that the case of a Hindoo, long recognized as an adopted Son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family. [*Rajendro Nath Holder v. Jogendro Nath Banerjee*] ... 67

#### ADVOCATE.

Suspension from practice.

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#### AGREEMENT.

Not to prosecute appeal.

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## ALIENATION.

Power of, by Hindoo Widow.

See "INHERITANCE," 1, 2.

## ALLUVION.

Two riparian proprietors of land on opposite sides of a River, respectively claimed *churs*, which had been diluviated for a great many years, and afterwards re-formed by a change of the course of the River, as belonging to their respective estates. After a public inquiry, the Magistrate, in 1836, put *A.* in possession. *B.*, the other riparian proprietor, took no steps till the year 1847 to obtain possession of the *churs*. Held (1), that the long delay in bringing a suit raised a presumption against *B.*'s title, and (2), that he had failed to identify the *churs* as having been formerly part of his lands or an accretion thereto. [*Sham Chund Bysack v. Kishen Prosaud Surma*] ... 595

## APPEAL.

1. When the heir-at-law contested the appointment of an adopted Son, and had a decree of the High Court in his favour, no costs were given on a reversal of the Decree of the Court below. [*Rajendro Nath Holdar v. Jogendro Nath Banerjee*] ... 67
2. The High Court at Calcutta, at the instance of the Appellant's Counsel, agreed to confine the decision of that Court to one point, with an undertaking, that no appeal to Her Majesty in

Council should be made from the Decree. Notwithstanding such undertaking, an appeal was brought to *England*. The High Court certified in the record the undertaking. Held, by the Judicial Committee, on a preliminary objection being taken to the hearing, on the ground of the incompetency of the appeal, that such undertaking precluded an appeal. [*Moonshee Ameer Ali v. Maharanee Inderjeet Singh*] 203

## ARREARS OF RENT.

Exposition of the principles enacted by the *Bengal Regulations* as to the power of a *Zemindar* to sell for arrears of rent the tenure, free from previous titles and incumbrances created by a defaulting tenant.

Distinction laid down in the *Regulations*, between sale for arrears of revenue and for arrears of rent.

*Ben. Reg. VIII.*, sect. 11, of 1819, gives express power to sell the tenure, free from all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives or assignees; but the power so given is confined to the case of tenures, where the right of selling or bringing to sale for an arrear of rent, has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure.

A Mortgagee had foreclosed under



*Ben. Reg. XVII. of 1806*, and a decree was made in 1854 for possession of the mortgaged *Talook*. In 1855 a summary suit was brought by the *Zemindar* against the heirs of the *Talookdar* (the Mortgagor) for arrears of rent, to which the Mortgagee was not made a party. A decree for sale was made *ex parte*, and the *Talook* sold by auction, under Act, No. VI. of 1858. The Mortgagee then brought a suit to recover possession of the *Talook*, and to set aside the sale by the *Zemindar* for arrears of rent. Held, reversing the decision of the High Court, that, as it was an *Istemrari talook*, the *Zemindar* had no power by the *Bengal Regulations*, or Act, No. X of 1859, sect. 105, to sell the tenure, and the sale declared invalid.

The case of *Shahabooddeen v. Fulleh Ali* (7 W. R., 260) approved of and followed. [*Forbes v. Baboo Luchmeeput Singh*] ... 330

#### ATTACHMENT AND SALE.

See "SALE IN EXECUTION OF DECREE."

#### AUCTION PURCHASER.

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#### AWARD.

Sale in execution of decree pending arbitration of the rights and interests of one of the parties in the forthcoming Award. [*Syud*

*Tuffuzzool Hossein Khan v. Rughoonath Pershad*] ... 40

#### BARRISTER.

1. Agreement by Counsel, that if the High Court admitted an appeal on one point, no appeal to the Queen in Council should be made. Held, binding on his Client. [*Moonshee Ameer Ali v. Maharanee Inderjeet Singh*] 203
2. Two Orders of the High Court of the *North-Western Provinces*, the one being an Order *nisi* calling on the Appellant, a Barrister and Advocate practising in that Court, to show cause why he should not be suspended from the practice of his profession as an Advocate of that Court, and the other Order declaring him guilty of gross professional misconduct, and suspending him from practice for five years, on appeal, as to the rule on which the first Order was made discharged, and the second Order reversed; the Judicial Committee being of opinion that, though the Appellant had been guilty of a grave irregularity and deserving of censure, yet the facts proved did not amount to that *mala praxis* on which the High Court, having regard to the position and functions of an Advocate in the *North-Western Provinces* could fairly found any proceeding of a penal character. [*Newton v. The Judges of the High Court, North-Western Provinces*] ... 267



## BENAMEE.

1. Suit by *A.* to establish his right to execute Decrees, against *B.* and another, by attachment and sale of lands in possession of *B.*'s Son, *C.*, on the ground that they were held by *C.* *Benamée* to defeat *B.*'s Creditors. Evidence was given that *C.* was the real Purchaser of the property sought to be attached, and not a *Benamée* holder for *B.* Nothing but hearsay evidence was given by *A.* that it was a *Benamée* transaction. Held, by the Judicial Committee, following *Sreemanchander Dey v. Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, 43), that although there may be with respect to *Benamée* transactions circumstances which might create suspicion and doubt as to the truth of the case, yet that the Court will not decide upon mere suspicion, but upon legal grounds established by evidence, and that from the evidence in the suit, the *bonâ fide* purchase by *C.* was established. [*Faez Buksh Chowdry v. Fukeeroodeen Mahomed Ahassun Chowdry*] ... 234

2. A Hindoo had only self-acquired estate Previous to his death his three Sons separated in food and left their Father's house, living separately. Held, that although there was a cesser of commensality, the normal condition of an undivided Hindoo family did not, from the evidence, operate as a complete separation, and the pro-

perty purchased after the separation in the name of one of the Sons, and a business carried on in the Son's name, declared to be *Benamée*, and that the same and the profits derived from the business formed part of the joint family estate. [*Mussumat Anundee Koonwur v. Khedoo Lal*] ... 412

3. *B.*, a Mahomedan married woman but separated from her Husband, contracted an irregular marriage with *V.*, and cohabited with him for many years, until her death. *V.*, during the time he so cohabited with *B.*, purchased an estate, which was registered in his name as the Owner. Eleven years after the date of the purchase, *B.* and *V.*, being then both deceased, a suit was brought by the then *Shajada Nusheen* to recover the estate bought by *V.*, on the ground, that it was purchased by him *Benamée* with moneys which belonged to the *Shajada Nusheen*, or lay-Owner of an *Imambarah*, or a Superintendent of a Mahomedan religious establishment, which he assumed to be Held, upon the evidence (1) that it was not a *Benamée* transaction, as the purchase-money was partly *V.*'s, and partly obtained by gifts from *B.* to *V.*; and (2) that it was not from the proceeds of a misappropriation by her, as Trustee of the *Imambarah*, as she was lay-proprietor, and had power of disposition, and, therefore, that the doctrine of resulting trusts did



not apply. [*Mussumat Ameerounnissa Khanum v. Mussumat Ashrufoonnissa*] ... .. 433

4. A Purchaser of the equity of redemption sold in execution of a Decree, who had obtained a certificate as Purchaser, under sect. 259 of the Code of Civil Procedure, Act, No. VIII. of 1859, brought a suit for redemption and possession against the usufructuary Mortgagee under a Deed of *Zur-i-peshgee* (usufructuary mortgage). Held (reversing the Decree of the High Court), that the Act, No. VIII. of 1859, was simply a Code of Procedure, not affecting existing law, and that the fact of the Plaintiff's title being certified as Purchaser was not conclusive by sect. 260 of that Act, to debar the Defendant, who was in possession, from pleading that he was the real Purchaser, and that the purchase was made *Benamee* for him by the certified Purchaser (as *Benamee* transactions are not prohibited by sect. 260, or *per se* illegal), so as to ascertain the title of the certified Purchaser. [*Mussumat Buhuns Kowur v. Lalla Buhooree Lall*] ... .. 496

#### BENGAL REGULATIONS.

III. of 1793, sect. 14 ; & II. of 1805, sect. 3, cl. 2 & 3.

See "LIMITATION OF SUITS," 2.

*Semble* : Sect. 6 of *Ben. Reg. XV.* of 1793 is repealed by sect. 7, Act,

No. XXVIII. of 1855. [*Radhabenode Misser v. Kripa Moyee Debea*] 443

XIX. of 1793, sect. 28, and II. of 1819, 30.

See "LIMITATION OF SUITS," 5.

XVII. of 1806.

See "ARREARS OF RENT."

#### BOMBAY REGULATIONS.

Reg. V of 1827, sect. 1, cl. 1.

See "PRESCRIPTION."

Reg. XVIII. of 1827, sects. 10, 11.

See "STAMP."

#### BOUNDARIES.

Rule of the Judicial Committee in respect to evidence in appeals involving only a question of Boundary. [*Ram Gopal Roy v. Gordon, Stuart, and Co.*] ... .. 453

See "EVIDENCE," 3.

#### BROTHER'S SISTER.

Whether a Sister can succeed by inheritance her Brother, according to the law received in the North-West Provinces, *Quære?* [*Koor Goolab Sing v. Rao Kurun Sing*] ... .. 176

#### CASTE.

Marriage between the *Malanar* and *Vallala* classes of *Soodras* held good. [*Ramamani Ammal v. Kulanthai Natchear*] ... .. 346

#### CAUSE OF ACTION.

See "ACTION."



CERTIFICATE

Of Court to Purchaser under sect. 259 of the Civil Procedure Act, No. VIII. of 1859, effect of as to title. [*Mussumat Buhuns Kowur v. Lalla Buhooree Lall*] ... 496

CODE OF CIVIL PROCEDURE.

(Act, No. VIII. of 1859.)

1. Held not to affect existing law in respect to *benamee* transactions. [*Mussumat Buhuns Kowur v. Lalla Buhooree Lall*] ... 496
2. Exposition of the principles and practice provided by the Code of Civil Procedure, Act, No. VIII. of 1859, in the execution of Decrees by attachment and sale of property within as well as without the jurisdiction of the Court by which the Decree is passed. *Saroda Prosaud Mullick v. Luchmeeput Sing Doogur* ... 529

COLORABLE TRANSACTION.

See "BENAMEE," I.

COMMENSALITY.

See "JOINT HINDOO FAMILY."

COMMISSION ON SALES.

See "CONTRACT."

COMPROMISE.

Suit against the Guardians of a Minor, to recover moneys alleged to be due from the estate of the Minor's Father. The Guardians compromised the suit and the

Deed of compromise was confirmed by the Court. After sixteen years, the Minor, being then of age, brought a suit against the Guardians to recover the amount paid under the Deed of compromise, alleging that the former suit was a fictitious one, and the compromise fraudulent and collusive between the Plaintiff and his Guardians. On appeal, held, by the Judicial Committee, reversing the judgments of the Courts in *India*, (1) that in the circumstances, the Guardians, in their discretion, were justified in making the compromise to protect the Infant's estate, and (2) that the burthen of proving the allegation that the former suit was fictitious and collusive, was upon the Plaintiff, and in the absence of *prima facie* evidence by him that no debt was due from the Father's estate, the *onus probandi* was not shifted on the Defendants to negative such allegation. [*Baboo Lekraj Roy v. Baboo Mahtab Chund*] ... 393

CONCEALED TRUST.

See "REGISTRATION," I.

CONSIDERATION.

Money, for sale of lands.

See "DURESS."

CONFISCATION

of Lands by Government.

See "REGISTRATION," I.



## CONSTRUCTION.

1. Construction of sect. 5, No. XIV. of 1859, as to *bonâ fide* Purchasers without notice and the Limitation of Suits Act, No. XIV. of 1859, sect. 5. [*Radanath Doss v. Gisborne & Co.*] ... 1
2. *Semble*:—A mere right of suit is not "property" within the meaning of Act, No. VIII. of 1859, sect. 205, but a title to recover future property. *Syud Tuffuz-zool Hossein Khan v. Rughoonath Pershad*] ... 40
3. *Semble*:—Act, No. XVI. of 1865, passed after the institution of proceedings before the Revenue Officers in *Oude*, has a retrospective operation. [*Hyder Hossain v. Mahomed Hossain*] ... 401
4. Construction of the Act of Limitation of Suits, No. XIV. of 1859, sects. 19 & 20. [*Kristo Kinkur Roy v. Rajah Burroda-caunt Roy*] ... 465
5. *Semble*:—Sect. 260 of Act. No. VIII. of 1859, is confined to a suit brought against a certified Purchaser, and does not embrace a suit brought by him against a party in possession. [*Mussumat Buhuns Kowur v. Lalla Buhooree Lall*] ... 496

## CONTRACT.

Action by a Firm against an Agent of the Firm, who received a *Puckah*, or *del credere* commission, on the goods of the Principals sold by their Agent. The last item in the account between

the Principals and Agent, in their dealings, accrued more than three years from the commencement of the suit. Held, on the construction of the Limitation of Suits Act, No. XIV. of 1859, that as the action was for breach of contract, it fell within the words "for breach of contract." in cl. 9, sect. 1, and that sect. 8 of that Act, which related to suits for balances of accounts current, did not apply. [*Oukur Pershad Bustoree v. Mussumat Foolcoomaree Bebee*] ... 134

## CONTESTIO LITIS

See "LIMITATION OF SUITS," 6.

## COSTS.

1. On reversal by the Judicial Committee of the decree of the High Court, such costs, as were allowed by the practice of the Courts in *India* to a successful Plaintiff suing *in formâ pauperis*, and paid, were ordered to be restored to the Defendant.  
As the heir-at-law in contesting the appointment of an adopted Son had a decree of the High Court in his favour, no costs of appeal were given on such reversal. *Rajendro Nath Holder v. Jogendro Nath Banerjee*] ... 67
2. As the Respondents had not applied in the first instance to dismiss on the ground of incompetence, but had allowed the case to proceed to the hearing of the appeal, costs *nomine expensarum* only, were allowed. [*Moonshee*



*Ameer Ali v. Maharanee Inderjeet Singh* ... .. 203

#### CUSTODY OF INFANT.

See "INFANT."

#### CUSTOMS AND USAGE.

See "DOWER."

"EVIDENCE," 2, 8.

#### DEATH, PRESUMPTION OF.

If no intelligence is received during twelve years, concerning the existence of a man who travelled to a Foreign Country, the presumption by Hindoo Law is, that he is dead. *Mussumat Anundee Koonwur v. Khedoo Lal*] ... 412

#### DECISIONS, OVERRULED.

1. The case of *Sreemanchander Dey v. Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, 43) followed. [*Faez Buksh Chowdry v. Fukeeroodeen Mahomed Akassun Chowdry*] ... .. 234
2. The case of *Shahchooddeen v. Futteh Ali* (7 W. R. 260) approved and followed. [*Forbes v. Baboo Luchmeeput Singh*] ... 330
3. *Kanhya Loll v. Rajah Churn* (2 W. R. 338) acted on, and Decrees in former suits held not a judgment *in rem*, but a judgment *inter partes*. [*Jogendro Deb Roy Kut v. Funindro Deb Roy Kut*] ... 367
4. The case of *Miharajah Dheeraj Mahtab Chund Bahadoor v. Bulram Singh* (13 Moore's Ind. App.

Cases, 479) followed. [*Kristo Kinkur Roy v. Rajah Burroda-caunt Roy*] ... .. 465  
 5. *Johan Chunder Mitter v. Buksh Ali Sondagur* (Marshall's Ben. App. Cases, 614) approved and followed. [*The General Manager of the Raj Darbhunga v. Maharajah Coommar Ramaput Singh*] ... 605

#### DECREE-HOLDER.

See "SALE IN EXECUTION OF DECREE," 2, 3, 4.

#### DEFERRED DOWER.

Amount how to be ascertained.

See "DOWER."

#### DELAY.

In lodging security, held in circumstances, not to vitiate a Sale in execution of a Decree. [*Saroda Prosand Mullick v. Luchmeeput Sing Doogur*] ... .. 529

#### DEL CREDERE.

See "CONTRACT."

#### DESCENT.

To single Heir.

See "EVIDENCE," 8.

"FAMILY ARRANGEMENT."

#### DOWER.

A Mahomedan Widow, whose Husband died without issue, having



been put in possession of her Husband's estate by the Collectorate Court as a co-heir and for her deferred dower, has a lien as a Creditor, on the estate, and is entitled to retain possession until her dower is satisfied.

Rs. 40,000, held, in the circumstances of the *status* and means of the deceased Husband, and the custom of *Sheikh* families in *Behar*, not an excessive amount for deferred dower. [*Mussumat Bebee Bachun v. Sheikh Hamid Hossein*] ... 377

#### DURESS.

Ejectment by *A.* against *B.* to recover possession of lands conveyed by a Deed of sale by *A.* to *B.*

The plaint, filed six years after the date of the transaction, alleged that *A.* had by duress and coercion by *B.* been induced to execute the Deed. *A.* had received the consideration-money, but in his plaint he made no offer to account for the same. Held, reversing the Decrees of the Courts in *India*, that upon the evidence, on case of duress had been made out.

Held, further, that *A.* could only be entitled to relief in a suit properly framed, upon terms of accounting for the consideration-money and interest, as *A.*, if he had been coerced and subjected

to such duress as destroyed his free agency, could not, at the same time, avoid the contract and retain the consideration-money. [*Guthrie v. Abool Mozuffer*] ... 53

#### EMBEZZLEMENT.

See "SURETY."

#### ENCROACHMENT.

See "EVIDENCE," 3.

#### ENDOWMENT.

See "RELIGIOUS ENDOWMENT."

#### ENHANCEMENT OF RENT.

By the purchase of a *Putnee* sold under *Ben. Reg. VIII.* of 1819. [*Farquharson v. Dwarkanath Singh*] ... 259

#### EQUITY OF REDEMPTION.

See "BENAMEE," 4.

#### EQUITABLE OWNER.

See "REGISTRATION," 1.

#### ESTOPPEL.

See "RES JUDICATA."

#### EVIDENCE.

1. A Plaintiff in a suit for resumption of land as part of his *mal zemindary* for assessment, is bound in the first instance to prove a *prima facie* case (1) the payment



- of rent since 1790, or (2) that the land formed part of the *mal* assets of the estate at the Decennial Settlement. When such a *prima facie* case is made out, the *onus probandi* is shifted on the Defendant, who, to exempt himself from assessment, must show that his tenure existed rent free before the 1st of *December*, 1790. [*Hurryhur Mookhopadhyaya v. Madub Chunder Baboo and Nobokishto Mookerjee v. Koylaschundro Buttacharjee*] ... 152
2. The omission of words of inheritance in a *Sunnud*, dated in 1743, granted by the then ruling power, which confirmed a previous grant, not in evidence, of the lands held *ghatwally* is not sufficient proof, *per se*, that such grant was not hereditary, when evidence of long and uninterrupted usage shows that the lands have descended from Father to Son as *ghatwally* for more than a hundred years. [*Kooldeep Narain Singh v. The Government*] ... 247
3. Suit by an Auction Purchaser of a *Putnee*, sold under *Ben. Reg. VIII.* of 1819, for possession of 3,000 *beegahs* of land within his *Putnee*, and to enhance the rent against a *Ghatwal* and the Government, charging encroachment against the *Ghatwal* beyond the quantity of 100 *beegahs* held *ghatwally*, according to a return made by a former *Ghatwal*. The only evidence of encroachment consisted of the *Isumnovisee* re-
- turns made by the *Thanadars* to the Magistrates in the years 1811, 1812, 1813, from which it appeared, that the quantity of land the then *Ghatwal* held *ghatwally* was 100 *beegahs*. Held, that the evidence of the Defendants of long uninterrupted possession of the 3,000 *beegahs*, presumably before the Decennial Settlement, outweighed the effect of the *Isumnovisee* returns, which were, though *prima facie*, not conclusive evidence of the quantity of the land held *ghatwally*: and further, that, though such return was not objected to by the then *Ghatwal*, it did not affect the right of the *Ghatwal* in possession. [*Farquharson v. Dwarkanath Singh* ... ... 259
4. In questions on disputed facts, the rule of the Judicial Committee is, that the ordinary legal and reasonable presumption of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to the Courts below may commonly be; that due weight must be given to the evidence; and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor prejudy widely imputed, without some grave grounds to support the imputation; as such a rejection would virtually submit the decision of the rights of others to the suspicion, and not to the deli-



- berate judgment, of the Judge. The entire history of a family must, therefore, not be thrown aside because the evidence of some of the Witnesses is incredible or untrustworthy. [*Ramamani Ammal v. Kulanthai Nat-  
cheer*] ... 346
5. On appeal, held, by the Judicial Committee, reversing the Judgments of the Courts in *India* (1) that, in circumstances, Guardians, in their discretion, were justified in making a compromise to protect the Infant's estate, and (2) that the burthen of proving the allegation that a former suit was fictitious and collusive, was upon the Plaintiff, and in the absence of *prima facie* evidence by him that no debt was due from the Father's estate, the *onus probandi* was not shifted on the Defendants to negative such allegation. [*Baboo Lekraj Roy v. Baboo Mahtab Chand*] ... 393
6. The mere fact that a member of a Mahomedan family in *Oude* was for fiscal purposes registered as sole owner of an estate, is not evidence of his exclusive right to the property. Such presumption from registration may be rebutted by evidence showing that the property was enjoyed in common by the family. [*Hyder Hossain v. Mahomed Hossain*] ... 401
7. With respect to the admissibility of copies of Grants or Deeds in evidence, the practice in the *Mofussil* Court differs from the procedure in *England*, and is not governed by the strict rules which there prevail, when the question is, whether a copy ought to be submitted to the jury; but it is the duty of the judge, before admitting a copy of an original document as evidence, to consider what weight and value should be given to it, and to test its authenticity by satisfying himself, that the grounds for not producing the original are well founded, so as to let in the copy as secondary evidence.
- A copy of a copy of an original *Sunnud*, registered, and proved in another suit, admitted as evidence. [*Ram Gopal Roy v. Gordon, Stuart, & Co.*] ... 453
8. If a party rely upon a special custom of a family to take the succession to the *zemindary* out of the ordinary Hindoo Law, such custom must be proved to be ancient and continuous.
- A Letter of Collector containing a Summary of the statements by *Zemindars* for information of the Board of Revenue in a dispute as to the right of inheritance to a *zemindary* in the same district, is not admissible as evidence. [*Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*] 570
- See "BENAMEE," 1, 3.
- "REGISTRATION," 2.
- "STAMP."



## EXECUTION OF DECREE

See "SALE IN EXECUTION OF DECREE."

## FAMILY ARRANGEMENT.

A., one of three Brothers of the *Nad Gowdki* family, in *Bombay*, in which family, it was alleged, a custom existed (the estate not being a *Raj* or Principality) by which the eldest Son succeeded to the estate, and the younger Brothers received maintenance, or an allotment out of the estate in lieu of maintenance; received an allotment of land from his elder brother. In consequence of disputes as to the allotment, A. afterwards executed a release in his elder Brother's favour, renouncing all share in the family estate. Held (without deciding, whether such family custom as pleaded existed), that the Deed of release constituted a transaction in the nature of a family arrangement, and was properly received in evidence, and was binding on A. [*Mantappa Nadgowda v. Baswuntrao Nadgowda*] ... 24

## FAMILY CUSTOM.

See "EVIDENCE," 8.

"FAMILY ARRANGEMENT."

## FIXED RENT.

See "ENHANCEMENT OF RENT."

"GHATWALLY TENURE."

## FORECLOSURE.

A foreclosure Decree only affects the interest of the parties to the suit. [*Anundo Moyce Dossee v. Dhondro Chunder Mookerjee*] ... 101

See "LIMITATION OF SUITS," 4.

"MORTGAGE," 3.

## FORMA PAUPERIS.

On reversal by the Judicial Committee of the Decree of the High Court, such costs as are allowed by the practice of the Courts in *India*, to a successful Plaintiff suing *in forma pauperis*, and paid, were ordered to be restored to the Defendant. [*Rajendro Nath Holdar v. Jogendro Nath Banerjee*] 67

## FRAME OF SUIT.

See "PLEADING."

## FRAUDULENT PREFERENCE.

See "INSOLVENCY."

## GHATWALLY TENURE.

An auction Purchaser of a *zemindary* at a sale for arrears of Government revenue cannot resume lands held under *ghatwally* tenure, at a fixed rent created before the Permanent Settlement on the ground that the services have ceased to be performed by the *Ghatwal*, and that there was no necessity for such services,



if the Government refuse to renounce its claim to *ghatwally* services. [*Kooldeep Narain Singh v. The Government*] ... 247

See "EVIDENCE," 3.

### GUARDIAN,

Power of, to compromise suit in respect of infant's estate. [*Baboo Lekraj Roy v. Baboo Mahtab Chand*] ... 393

### HEREDITARY OFFICE.

See "PALKHI HUK."

### HINDOO LAW.

See "INHERITANCE."

### IDOL,

Dedication of land for religious services of,

See "RELIGIOUS ENDOWMENT."

### IMAMBARAH.

(Mahomedan religious establishment.)

See "BENAMEE," 3.

### INFANT.

A child born in *India* whose Father was a European British subject and a Christian, must be presumed to have the Father's religion, and his corresponding

civil and social *status*, and it is the duty of a Guardian to bring up his Ward in his Father's religion.

An Infant, the child of a Christian Father and the issue of a Christian marriage, was left, by the death of her Father, of very tender age, and brought up by her Mother as a Christian during her early youth. Her Mother, after cohabiting with a man having a Wife and professing the Christian religion, became, with him, a Mahomedan, for the purpose, as it appeared, of giving legal effect to a Mahomedan marriage between them, but which alleged marriage was not proved to have been duly celebrated.

The Infant, after attaining the age of fourteen years, and being with her Mother, professed a desire to become a Mahomedan in religion, and adopted the Mahomedan mode of life. The Courts in *India* having been applied to, under the circumstances, by her relatives, to remove the Infant from the custody of her Mother, made an Order under the provisions of the Acts, Nos. XL. of 1858 and IX. of 1861, and placed the Infant under a Christian Guardian. Such Order, on appeal, confirmed by the Judicial Committee. [*Skinner v. Orde*] ... 309

See "COMPROMISE."



## INHERITANCE.

(By HINDOO LAW.)

1. On the death of *D.*, his Widow succeeded, according to the *Mitáshará*. By Deeds of gift and sale she and her Husband's Mother alienated part of her Husband's estate. *R.*, the fifth in descent from the common ancestor of *D.*, whose Father was dead, brought a suit as Gurdian of his Grandfather, a Lunatic, against the alienees and *D.*'s Mother, the heir of *D.*'s Widow, then deceased, to set aside the alienations of the inheritance, and for possession. The Courts in *India* set aside the alienations as having been made without such necessity as is required by Hindoo Law. Such decree affirmed on appeal.

At the time of the institution of the suit, *D.*'s Mother was alive :—  
Held, that *R.*, as the next presumable reversioner, was entitled to sue to preserve the estate, and that it was not a fatal objection to the suit that she died before decree in a suit so framed, as it was only a matter of form, not affecting the merits. *Koor Goolab Sing v. Rao Kurun Sing*

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2. In the absence of proof showing a legal necessity a Widow has no power, by Hindoo Law, to charge or mortgage the estate of her deceased Husband so as to affect the inheritance. [*Rao*

*Kurun Sing v. Nawab Mahomed Fyz Ali Khan*] ... .. 187

3. The omission of words of inheritance in a *Sunnud*, confirming a previous grant not in evidence, coupled with hereditary descent for more than a hundred years, creates presumption of the original *Sunnud* being hereditary. [*Kooldeep Narain Singh v. The Government*] ... .. 247

4. *A.*, who had a first or royal Wife living, who died without issue, intermarried on the same day with *B.* and *C.* Both Wives had male issue, *C.*'s Son being born first. Held, that *C.*'s Son was entitled to succeed to an impartible *zemindary* in preference to *B.*'s Son, as, by Hindoo Law, priority of birth was not affected by the prior marriage with *B.*, the then senior Wife.

If a party rely upon a special custom of a family to take the succession to the *zemindary* out of the ordinary Hindoo Law, such custom must be proved to be ancient and continuous. [*Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*] ... .. 570

## INSOLVENCY.

A Firm, though insolvent, may part with or put an end to a current speculation, the result of which is still uncertain, on the best terms procurable, without any imputation of fraud; so also, the abandonment of a specula-



tion whilst the result is uncertain may be both honest and politic, as it entirely differs from undue preference of one Creditor to others after a debt has been incurred.

Proceedings were taken under the Indian Insolvent Act, 11th & 12th Vict. c. 21, and the proceeds of certain goods claimed by the Official Assignee, paid by the Assignee into the Bank of Bengal. In a suit brought in the High Court at Calcutta, by A. against the Official Assignee, claiming the proceeds of the goods paid into the Insolvent Court:—Held, on the Court making a decree in favour of the Plaintiff, that the High Court, being a Court of Law and Equity, had power to award interest on the amount, as against the Official Assignee. [*Miller v. Barlow*] ... .. 209

### INTEREST,

On money paid into Court.

See "INSOLVENCY."

### INSOLVENT ACT.

11th & 12th Vict. c. 21.

See "INSOLVENCY."

### ISSUES.

See "RES JUDICATA."

### ISTEMRARY TALOOK.

See "ARREARS OF RENT."

### ISUMNOVISEE RETURNS.

Though *prima facie*, are not conclusive evidence of the quantity of the lands held *ghatwally*. [*Farquharson v. Dwarkanath Singh*] ... .. 259

See "EVIDENCE," 3.

### JOINT HINDOO FAMILY.

Cesser of commensality is strong, though not conclusive, evidence of partition of joint family property, and removes or qualifies the presumption of Hindoo Law, that the acquisition of property by a member of the family is made by means of the joint estate, but the *onus probandi* lies on a member of the family setting up separation to prove that the property was acquired by himself after separation, and not from estate of the joint family.

A Hindoo had only self-acquired estate. Previous to his death his three Sons separated in food and left their Father's house, living separately. Held, that although there was a cesser of commensality, the normal condition of an individual Hindoo family did not, from the evidence, operate as a complete separation, and property purchased after the



separation in the name of one of the Sons, and business carried on in the Son's name, declared to be *Benamtee*, and that the same and the profits derived from the business formed part of the joint family estate. [*Mussumat Annudee Koonwur v. Khedoo Lal*] 412

### JUDGMENT.

See "RES JUDICATA."

### JUDGMENT CREDITOR.

See "LIMITATION OF SUITS," 2.

"SALE IN EXECUTION OF DECREE."

### JURISDICTION.

See "SALE UNDER EXECUTION OF DECREE." 2.

### LACHES.

See "ALLUVION."

### LAKHIRAJ.

Review of the *Ben.* Regulations relating to *Lakhiraj* tenures within the Provinces included by the Perpetual Settlement. [*Hurryhur Mookhopadhyas v. Madub Chunder Baboo, and Nobokishto Mookerjee v. Koylaschundro Buttacharjee*]

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### LEGITIMACY.

See "MARRIAGE," 1.

"RES JUDICATA."

### LETTERS PATENT.

A cause was heard before a single Judge of the High Court, and a decree made by him dismissing the suit. An appeal was made to the same Court in its appellate jurisdiction before two Judges. The Court was divided in opinion; the Chief Justice holding that the judgment should be reversed, and the Puisne Judge that it ought to be affirmed; and, under the 36th section of the Letters Patent of 1865, creating the High Court, a decree of reversal was ordered. On appeal, the Judicial Committee, without expressing any opinion, whether the 36th section was applicable, having regard to the 26th rule of the High Court, directed the appeal to be heard on the merits. [*Miller v. Barlow*]

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### LIEN.

By Mahomedan Widow in possession of her Husband's estate, for deferred Dower. [*Mussumat Bebee Bachun v. Sheikh Hamid Hossein*] ... 377

### LIMITATION OF SUITS.

1. Circumstances in which it was held, that parties were not "Purchasers" within the true construction of sect. 5 of Act, No. XIV. of 1859, to entitle them to the benefit of the twelve years'



- limitation as a bar to a suit for redemption. [*Radanath Doss v. Gisborne & Co*] ... .. 1
2. The title of a judgment Creditor or a Purchaser under a decree sale, is not on the same footing with respect to the law of limitation of suits, as that of a Mortgagor, or one claiming under an alienation from the Mortgagor.
- If a Purchaser under a decree sale has been in undisturbed possession for more than twelve years, without notice of a prior subsisting mortgage, and foreclosure sale made thereon, the *Ben. Regs. of Limitation*, III. of 1793, sect. 14; II. of 1805, sect. 3, cls. 2 and 3; and Act, No. XIV. of 1859, sect. 1, cl. 12, apply and are a bar to a suit against such Purchaser for possession, by parties claiming under the decree sale made in the foreclosure suit. [*Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee*] ... .. 101
3. Held, on the construction of the Limitation of Suits Act, No. XIV. of 1859, that an action being for breach of contract under sect. 1, cl. 9, sect. 8, which relates to suits for balances of accounts current, did not apply. [*Oukur Pershad Bustoorree v. Mussumat Foolcoomaree Bebee*] ... .. 134
4. A mortgage made in 1845 in the English form, contained a proviso for redemption, and for the Mortgagor; continuing in possession until default in payment, in which event the mortgage Deed gave a right of entry to the Mortgagee. Default was made in payment of the mortgage money by the Mortgagor, but no steps were taken by the Mortgagee to obtain possession. In 1849 the Mortgagor sold part of the mortgaged estate, and the Purchaser entered into possession and registered his title. The Assignee of the Mortgagee afterwards brought a suit for foreclosure to which the Purchaser was not made a party, and in the year 1862 obtained a decree for foreclosure. In a suit brought by the Assignee of the Mortgagee against the Purchaser for possession of that part of the estate so purchased by him from the Mortgagor, held, by the Judicial Committee, affirming the judgment of the High Court at *Calcutta*, that as the Mortgagor after default, and the Purchaser under him, had been in possession for more than twelve years before the suit for possession was instituted, the Limitation of suits Act, No. XIV. of 1859, sect. 1, cl. 12, was a bar to the suit. [*Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*] ... .. 144
5. Construction of Act, No. X. of 1859, sect. 28, in respect to the operation of the law of limitation in suits brought under *Ben. Regs. XIX. of 1793*, sect. 10, and *II of 1819*, sect. 30, for resumption and assessment of lands



as *mal*, or rent-paying lands, held as *Lakhiraj*. [*Hurryhur Mookhopadyha v. Madub Chunder Baboo*, and *Nobokishto Mookerjee v. Koylaschundro Buttacharjee*] ... 152

6. Review of the authorities with respect to the period of limitation under sects. 19 & 20 of Act, No. XIV. of 1859, applicable to Decrees of the High Court made on appeal from the Courts in the *Mofussil*, in applying to the Lower Courts for process of execution of the High Court's Decree.

A Decree of the High Court affirming, on appeal, a Decree of the District Court, is subject to the three years' limitation prescribed by sect. 20 of Act, No. XIV. of 1859, and operates as a bar to the issue of process of execution by the Lower Court, if not applied for within three years, unless "some proceeding," as provided by that section of that Act, has been taken to keep alive the High Court's Decree.

In *March*, 1862, a Decree was made by a *Mofussil* Court, which, on appeal, was affirmed by the High Court in *June*, 1863. An appeal from the High Court was interposed to the Queen in Council, and pending such appeal a petition by both parties was presented in *April*, 1865, to stay proceedings for two months to effect a compromise, which did not take place, and afterwards, in the same year, no steps having been taken, the High Court in

*May*, 1866, struck out the appeal. In 1867, the Decree-holder applied to the Lower Court for execution of the Decree, but that Court refused to issue execution on the ground, that the Decree was barred by the three years' limitation provided by sect. 20, and such holding was confirmed on appeal by the High Court. Held, by the Judicial Committee, following *Maharajah Dheeraj Mahtab Chund, Bahadoor v. Bulram Singh* (13 Moore's Ind. App. Cases, 479), that when the parties consented to the petition to stay proceedings there was such a *contestatio litis* touching the appeal to *England* as constituted "some proceeding," provided for by sect. 20 of the Act, No. XIV. of 1859, and took the case out of the operation of the three years' limitation provided by that section.

Whether Her Majesty's Order in Council, made on an appeal from the High Court, not being strictly a Decree of a Court, but an act done by the Queen by virtue of Her prerogative, upon the recommendation of a Committee of Her Privy Council, which prescribes what shall be the final Decree in the suit, and leaves it to be executed by the ordinary process of the Courts in *India*, is subject to the Limitation of Suits Act, No. XIV. of 1859. *Quære?* [*Kristo Kinkur Roy v. Rajah Burrodacaunt Roy*]



## LUNACY.

Lunacy by Hindoo Law is a bar to succession. [*Koor Goolab Sing v. Rao Kurun Sing*]... .. 176

## MAHOMEDAN LAW.

See "DOWER."

## MAINTENANCE.

See "FAMILY ARRANGEMENT."  
"WIDOW," 3.

## MARRIAGE.

1. A marriage between a *Zemindar* of the *Malavar* class, a sub-division of the *Soodra* caste, with a woman of the *Vellala* class of *Soodras*. Held (1) as to the *factum*, that a marriage had taken place, and (2) that such a marriage was valid by Hindoo Law. [*Ramamani Ammal v. Kulanthai Natchear*] 346
2. Priority of birth of a Son, where a man has more than one Wife, and not priority of marriage, entitles the first-born Son to succeed to an impartible *Zemindary*. [*Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*] 570

See "RES JUDICATA."

## MITACSHARA.

Succession by Sister to Brother. [*Koor Goolab Sing v. Rao Kurun Sing*] ... .. 176

## MITHILA LAW.

See "WIDOW," 3.

## MORTGAGE.

1. A usufructuary mortgage, to run over a certain number of years, was executed in 1828 by a member of a joint Hindoo family, with the consent of the other members, to *R.*, who afterwards sold the mortgaged estate to *H.* and *H.*, whose Agent *R.* was. *H.* and *H.* subsequently, in 1841 and 1851, conveyed the estate to *G. & Co.*, as an absolute purchase in fee. In a suit for redemption of the Mortgage brought in 1864, *G. & Co.* set up as a defence their title as *bona fide* Purchasers without notice, and, having been in possession more than twelve years, pleaded the Limitation of Suits Act, No. XIV. of 1859, sect. 5, as a bar to the suit. Held: First, that the *onus* was on *G. & Co.* to establish by clear and satisfactory evidence the termination of the mortgage and the absolute sale by the Mortgagees to *R.* the root of their title; and in the absence of such proof, that the transaction in 1841 and 1851 was merely an assignment of the mortgage; and, Secondly, in the circumstances, that *G. & Co.* were not "Purchasers" within the true con-



- struction of sect. 5 of Act, No. XIV. of 1859, to entitle them to the benefit of the twelve years' limitation as a bar to the suit for redemption. [*Radanath Doss v. Gisborne & Co.*] ... .. 1
2. Right of entry on default of payment of principal and interest, at a certain date leaving the Mortgagor in possession, circumstances under which it was held, that the Limitation of Suits Act, No. XIV. of 1859, sect. 1, cl. 12, was a bar to the suit. [*Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*] 144
3. A Mortgagee had foreclosed under *Ben. Reg.* XVII. of 1806, and a Decree was made in 1854 for possession of the mortgaged *Talook*. In 1855 a summary suit was brought by the *Zemindar* against the heirs of the *Talookdar* (the mortgagor) for arrears of rent, to which the Mortgagee was not made a party. A Decree for sale was made *ex parte* and the *Talook* sold by auction, under Act, No. VI. of 1858. The Mortgagee then brought a suit to recover possession of the *Talook*, and to set aside the sale by the *Zemindar* for arrears of rent. Held, reversing the decision of the High Court, that, as it was an *Istemrari Talook*, the *Zemindar* had no powers by the *Bengal Regulations*, of Act, No. X. of 1859, sect. 105, to sell the terms, and the sale declared invalid.
- The case of *Shahabooddeen v. Futteh Ali* (7 W. R. 260) approved and followed. [*Forbes v. Baboo Luchmeeput Singh*] ... .. 330
4. A loan transaction in 1837 was effected by two Deeds—first, a *Kabala*, an absolute Deed of sale, and secondly, an *Ikrarnamah* or Deed of agreement, constituting a mortgage. The *Ikrarnamah* provided, that if the Mortgagor paid, within ten years, a lump sum at the rate of 12 *per cent.* interest, he was to recover back the estate and the balance of collections, less charges. The Mortgagee entered into possession. No interest on the principal sum was paid at the time stipulated, and in 1859 a redemption suit was brought by the Mortgagor's heir and for possession. Held (1), that the *Ikrarnamah* did not take the case out of an ordinary mortgage transaction; (2) that *Ben. Reg.* XV. of 1793 did not apply, and an account directed to be taken of what had been received by the Mortgagee, upon the footing, that the interest which accrued from time to time was to be set off against the rents and profits received, and the Mortgagee only to account to the Mortgagor for the rents, profits, and interest which he might have received, over and above the interest then due to him on the mortgage. [*Radhabenode Misser v. Kripa Moyee Deben*] ... .. 443



## MORTGAGOR IN POSSESSION.

See "MORTGAGE," 2.

## ONUS PROBANDI.

See "EVIDENCE," 1, 5.

"JOINT HINDOO FAMILY."

## ORDER IN COUNCIL.

Made on appeal from the High Court, whether subject to the Limitation of Suits Act, No. XIV. of 1859. *Quere?* [*Kristo Kinkur Roy v. Rajah Burroda-caunt Roy*] ... .. 465

## OUDE.

Registration of Ownership of a *Talook* including an independent *Mehah*, at one *jumma*, effect of. [*Mussumat Thukrain Sookraj v. The Government*] ... .. 112

## PALKI HUK.

An annual allowance for *Palki Huk* (Palanquin allowance) to the holder of the hereditary office of *Desai* of *Broach*, held under a *Jaghire* grant, charged by former native Governments on the land revenues of that *Pergunnah*, is incident to the tenure of *Desai*, and is not resumable by Government. *The Government of Bombay v. Desai Kullianrai Hakoomutrai*] ... .. 551

## PARTIES TO SUIT.

See "FORECLOSURE."

## PARTITION.

See "JOINT HINDOO FAMILY."

## PERMANENT SETTLEMENT.

See "GHATWALLY TENURE."

## PLEADING.

In a suit for possession by *A.* to set aside a sale on the ground that Lands conveyed by him to *B.* for a money consideration was under duress and coercion; there was no allegation in the plaint offering to account for the consideration-money. Held, that as the suit was improperly framed, *A.* could not avoid the contract and retain the consideration-money. [*Guthrie v. Aboul Mozuffer*] ... .. 53

## PRACTICE.

1. On reversal of a Decree of the High Court, in a suit *in forma pauperis*, such costs as are allowed in *India* in such a suit, ordered to be restored to the Defendant. [*Rajendro Nath Holdar v. Jogendro Nath Banerjee*] ... 67
2. A point not having been raised by the issues in the suit, the Judicial Committee refused to decide the question. [*Kooer Goolab Sing v. Rao Kurun Sing*] 176
3. Where the Respondents had not applied in the first instance to dismiss an appeal on the ground of incompetency, but had allowed the case to proceed to the hearing of the appeal, costs *nomine expensarum* only, were allowed. [*Moonshee Ameer Ali v. Maharane Inderjeet Singh*]... .. 203



4. In the absence of substantial error, either in the finding of the facts or in the principles of law applied in cases depending on local customs and local inquiry before the Revenue Officers in *Oude*, where the proceedings are not strictly conducted, this Court will look to the merits and apply the rule not to disturb the judgment appealed from, unless they are satisfied that the judgment is materially wrong. [*Hyder Hossain v. Mahomed Hossain*] 401
5. It is the rule of the Judicial Committee in question of boundaries, which depend upon local investigation and local enquiries, not to interfere with the findings of the Courts below, unless they are clearly satisfied, that there has been some plain miscarriage in the conduct of the enquiry and the decisions of the Courts. [*Ram Gopal Roy v. Gordon Stuart & Co.*] ... .. 453

### PREScription.

A money allowance for *Palkhi Huk* paid by Government out of the land revenue of a particular *Per-gunnah* to successive *Desais*, for upwards of thirty years, does not create a prescriptive title, as such money payment is not "immovable property" within the meaning of *Bom. Reg. V.* of 1827, sect. 1, cl. 1. [*The Government of Bombay v. Desai Kullianrai Hukoomutrai*] ... 551

### PRESUMPTION.

1. Of adoption arising from acquiescence of the adopter's family. [*Rajendro Nath Holder v. Jogen-dro Nath Banerjee*] ... 67
2. From registration in the name of one Member of a Mahomedan family as sole Owner, may be rebutted by showing that the property was enjoyed in common by the family. [*Hyder Hossain v. Mahomed Hossain*] ... 401
3. Of death by Hindoo law. [*Mussumat Anundee Koonwur v. Khedoo Lal*] ... .. 412

### PRINCIPAL AND AGENT.

See "CONTRACT."

### PURCHASER.

A purchaser for valuable consideration without, as alleged, notice of the lands being dedicated to the religious services of an Idol held affected by notice of the trust, his title being derivable through the Deed of dedication, and further that the *onus* of proving his title as purchaser exempt from such trust was on him. [*Juggut Mohini Dossee v. Mussumat Sookheemoney Dossee*] ... .. 289

### RAZINAMAH.

See "COMPROMISE."

### RAJ.

Succession to,

See "INHERITANCE," 3.

"RES JUDICATA."



## REDEMPTION

See 'MORTGAGE,' 2, 4.

## REGISTRATION.

1. *Oude*, before its annexation to the British rule, a *Rajah* was a *Talookdar* of a large *Talook*. A younger branch of his family had a separate *Mahal* in the possession of *A.*, wholly distinct from and independent of the *Talook* the *Rajah* possessed, as representing the elder branch of the family. The *Oude* Government, for fiscal purposes, included *A.*'s *Mahal* with the *Rajah*'s *Talook*, so that the *Rajah* as the elder branch of the family represented *A.*'s *Mahal* at the Court at *Lucknow*, notwithstanding that *A.* remained in undisturbed possession as absolute Owner paying through the *Rajah* for his *Mahal* a proportion of the *jumma* fixed on the *Talook*. This relation between the *Rajah* and *A.* subsisted up to the time of the annexation of *Oude* by the British Government. While the Government was making a settlement with the Landowners and *A.* was about to apply for a distinct settlement of his *Mahal*, he, and after him his Widow, was induced by the *Rajah* not to do so, the *Rajah* in Letters fully recognizing *A.*'s absolute right to the *Mahal*. After the suppression of the rebellion in *Oude*, and the Government had recog-

nized *Talookdary* tenure with its rights, a provisional settlement of the *Talook* including *A.*'s *Mahal*, was made with the *Rajah*; but before a *Sunnud* was granted to him, Government confiscated half his estate for concealment of Arms. The *Rajah* suppressed the fact of the trust relation of the *Mahal* of *A.*, and contrived that it should be included in the half part of the estate the Government had confiscated; which *Mahal* the Government as a reward granted to *Oude* loyalists. *A.*'s Widow brought a suit against the Government and the Grantees for the restoration of the *Mahal* and a settlement. The Financial Commissioner held, that as the *Rajah* was the registered Owner of the *Mahal* of *A.*, included in his *Talook*, it had been properly forfeited. Such finding reversed on appeal on the ground that *A.* was the acknowledged *cestui que* trust of the *Rajah*, and that *A.*'s Widow, as equitable Owner, was not affected as between her and the Government by the act of confiscation of half the *Rajah*'s *Talook* [*Mussumat Thukrain Sookraj Koowar v. Government.*] ... 112

2. The provisions of sect. 49 of the Registration Act, No. XX. of 1866, are imperative, and admit of no instrument being received in evidence in a civil suit, without being registered: registration being compulsory, by cl. 2, sect. 17, of that Act.



*Semble*: Under the 84th sect. of the Registration Act, the District Judge, if a *prima facie* case of execution of documents falling under sects. 17 or 18, is made out to his satisfaction, has power to direct the instrument to be registered; leaving the parties to try the question of forgery or non-forgery in a regular suit. [*Futteh Chund Sahoo v. Leelumber Singh Doss*] ... 129

3. The mere fact that a member of a Mahomedan family in *Oude* was for fiscal purposes registered as sole Owner of an estate, is not evidence of his exclusive right to the property. [*Hyder Hossain v. Mahomed Hossain*] ... 401

## RELEASE.

See "FAMILY ARRANGEMENT."

## RELIGIOUS ENDOWMENT.

Suit for possession of lands dedicated to the religious service of a family Idol, and for the appointment as *Sebaet*, or Manager, of such religious endowment, under a Deed of Dedication; against a party in possession, claiming title as a *bona fide* Purchaser for value without notice of the alleged trust, whose title, however, was derivable through the Deed of dedication; held wrongly dismissed by the Court below, the Purchaser proceeded against having had sufficient notice to throw upon him the *onus* of

proving exemption from the religious trust in the lands, which he had failed to do. [*Juggut Mohini Dossee v. Mussumat Sokheemoney Dossee*] ... 289

## RELIGIOUS EDUCATION OF INFANT.

The Father was a Christian, the Mother a Mahomedan. Order made that the infant be brought up in the religion of the Father, under a Christian Guardian. [*Skinner v. Orde*] ... 309

## RES JUDICATA.

A *Rajah* of an impartible *Raj* died leaving children by various Wives and Concubines. A suit by one of the Widows, on behalf of an infant, was brought to set aside a summary Award under Act, No. XIX. of 1841, giving possession, and for possession of the *Raj*. This suit involved issues of legitimacy, and the validity of a particular form of marriage of one of the members of the family. The *Sudder Dewanny Adawlut* decreed in favour of the Plaintiff. Another suit was afterwards brought against the party in possession, which raised substantially the same issue of legitimacy, and a further question of priority to succeed by reason of the superior nature of the marriage of which the Plaintiff was the issue. The Defendant pleaded the decree of the *Sudder Court* as



a bar to the suit. Held that the suit raised a different issue, and, acting upon *Kanhya Loll v. Rajah Churn* (2 W. R. 338), that the decree in the former suit was not a judgment *in rem*, but a judgment *inter partes*. [*Jogendro Deb Roy Kut v. Funindro Deb Roy Kut*] ... 367

#### RESUMPTION.

See "PALKHI HUT."

#### RESUMPTION SUIT.

By *Zemindar* for Assessment of Rent.

See "EVIDENCE," 1.

"LIMITATION OF SUITS," 5.

#### RESULTING TRUST.

See "BENAMEE," 3.

#### REVERSIONER.

A presumptive reversioner is entitled to sue to preserve the family estate. [*Koor Goolab Sing v. Rao Kurun Sing*] ... 176

#### RIPARIAN RIGHTS.

See "ALLUVION."

#### RUFFANAMAH.

See "COMPROMISE."

#### RUNNING ACCOUNT.

See "CONTRACT."

"LIMITATION OF SUITS," 3.

#### SABAET.

See "RELIGIOUS ENDOWMENT."

#### SALE IN EXECUTION OF DECREE.

1. Under a remit from the Privy Council to the Court of First Instance, to refer to arbitration, with the consent of the parties, the accounts of a partnership Firm, reference under a submission and Order of the Court was duly made to Arbitrators. Before any Award was made, the "rights and interests" of one of the parties in the Award were, by Order of the Court, sold by auction in satisfaction of a Decree against him made in another suit by a third party. Held, that the expectant claim under an inchoate Award was not "property" within the meaning of sect. 205 of Act, No. VIII. of 1859, and was not saleable in execution of a Decree. [*Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad*] ... 40
2. Exposition of the principles and practice provided by the Code of Civil Procedure Act, No. VIII. of 1859, in the execution of Decrees by attachment and sale of property within, as well as without, the jurisdiction of the Court by which the Decree is passed.  
Decree against *A.*, in the *Zillah* Court of *E. B.* In consequence

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of the property of *A.* in that *Zillah* not realizing on sale the amount of the Decree, the Judge sent a certificate to the Judges of three other *Zillah* Courts *M.*, *H.*, & *D.*, in which other property of *A.* was situate, which had been attached. The proceeds of sale of the property in *Zillah H.* were also insufficient and in *Zillah D.* the property of *A.* was sold to the Manager of the Decree-holder, a Lunatic, who was ordered to find security for the proceeds of the sale before possession. Pending the completion of the security, another Decree-holder against *A.* obtained an attachment of *A.*'s property in *Zillah D.*, and sold the property of *A.* brought for the first Decree-holder, and the Court awarded possession to the second Purchaser. In a suit on behalf of the first Decree-holder for possession under the first sale, Held:—

First, that under the provisions of sects. 248 to 272 in the case of immovable property, the process of attachment and the Order for sale may be distinct and separate, and there may be a complete execution of a Decree under an attachment without any Order of sale.

Secondly, that there was no irregularity in the Judge of *Zillah E. B.* transmitting the record to three several *Zillah* Courts at the same time for execution, as

the first process of execution, namely, by attachment, could effectually stay the execution sales in *D.* & *H.* until the result of the sale in *M.* was known.

Thirdly, that under the 286th section of Act, No. VIII. of 1859, the transmission of the record for execution by the Judge of *Zillah E. B.* could, in the discretion of the Judge, be sent to the Courts *M.*, *H.*, & *D.* concurrently for execution; and

Fourthly, that the delay in lodging the security did not vitiate the sale. [*Saroda Prosaud Mullick v. Luchmeeput Sing Doogur*] ... 529

3. *A.*, a mortgagee obtained under Act, No. VIII. of 1859, an attachment against his Debtor's real estate. Before removal of the attachment or sale, by *A.*, the Debtor made a *bonâ fide* sale, for value, of the estate so attached, and out of the proceeds satisfied *A.*'s judgment-debt. *B.*, another judgment-creditor, also obtained an attachment against the same estate, which was subsisting at the time of the sale by the Debtor, and sold the estate treating the former sale as null and void:—Held, that the first sale made was valid under sect. 240 of the Act, No. VIII, of 1859, as against the first attaching judgment-creditor, and not affected by the subsequent attachment and sale thereunder by *B.* [*Annud Loll Doss v. Jullodhur Shaw*]

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4. In a suit by *A.* against *B.* for arrears of rent, a decretal Order was obtained by *A.* against *B.*'s Widow; *B.* having died pending the suit. Under this Decree execution of the Decree was obtained, and the interest of the Widow was sold under Act, No. XI. of 1859. The amended Certificate stated, that the estate was sold by virtue of the Decree. Held, reversing the Decree of the High Court, and following *Johan Chunder Mitter v. Buksh Ali Soudagur* (Marshall's Ben. App. Cases, 614), that the sale was not of the Widow's personal interest, but as the representative of her Husband's estate. [*The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Sing*] ... 605

#### SALE OF TENURE.

See "ARREARS OF RENT."

"GHATWALLY TENURE."

#### SECONDARY EVIDENCE.

See "EVIDENCE," 7.

#### SPLITTING SUIT.

See "ACTION."

#### SOODRAS.

Marriage between different classes.

See "MARRIAGE," 1.

#### STAMP.

A Deed was written on unstamped paper, but it was stipulated in the Deed that *A.* should get it stamped; which was done, but instead of an *ad valorem* stamp, a stamp of 2 *annas* only was impressed. *A.*, after having been in possession of his allotment for ten years, brought a suit against his elder Brother, claiming a share in the family estate, according to the ordinary Hindoo Law, and impeaching the Deed of release as a forgery. The *Sudder Ameen* upheld the Deed. On appeal to the Civil Court of *Dharwar*, *A.* for the first time objected to the reception of the Deed as evidence, as not being impressed with a stamp sufficient to cover the value of the property allotted to him. That Court admitted the Deed as evidence of the release. On appeal, the High Court also upheld the Deed, but, under *Bom. Reg. XVIII. of 1827*, sects. 10, cl. 1, and 12, cl. 2, reduced its effect and operation by making it a Deed of release for so much only of the property comprised in it as would be covered by the 2 *anna* stamp impressed. Held by the Judicial Committee, reversing such decree, that the course adopted by the High Court in respect to the insufficiency of the stamp was erroneous as it was the duty of that Court (1) either to have refused to admit



the Deed as evidence for want of a proper stamp, or (2), in the alternative, to have required the Deed to be properly stamped before admitting it as evidence. [*Mantappa Nadgowda v. Baswuntrao Nadgowda*] ... .. 24

## SUCCESSION.

See "INHERITANCE," 1, 3, 4.  
"LUNACY."

## SUNNUD.

In ancient grants, before the British rule in *India*, it was customary, where the tenure was in fact hereditary and passed as hereditary from Father to Son, to take out a new *Sunnud* on each descent. [*Kooldeep Narain Singh v. The Government*] ... 247

## SURETY.

A Treasurer of a Collectorate was found, on going into his accounts, to have been a party with others in embezzling Government moneys in his Collectorate. His defalcations ran over several years. A surety Bond had been given for the Collector's acts, and the Bond was renewed three times by the same Surety during the period the Treasurer was in office, but the Surety never asked for the old Bonds to be delivered up when they were renewed. In an action by the Government

against the Surety to recover the amount embezzled, held, that the renewal of the Bonds did not discharge the Surety from his liability under the first Bond, as the renewed Bonds were not in substitution of the first Bond. [*Lalla Bunseedhur v. The Government of Bengal*] ... .. 86

## SUSPENSION

Of Barrister and Advocate from practice.

See "BARRISTER," 2.

## TENURE.

See "GHATWALLY TENURE."

## TREASURER.

Embezzlement by, liability of Surety. [*Lalla Bunseedhur v. The Government of Bengal*] ... 86

## TRUST.

See "BENAMEE."

"REGISTRATION," 1, 3.

"RELIGIOUS ENDOWMENT."

## USAGE.

See "EVIDENCE," 2, 8.

"SUNNUD"

## UNDIVIDED HINDOO FAMILY.

See "JOINT HINDOO FAMILY."

## USUFRUCTUARY MORTGAGE.

See "MORTGAGE," 1, 4.



## WIDOW.

(Hindoo.)

1. Power of, to alienate her Husband's estate. [*Koer Goolab Sing v. Rao Kurun Sing*] ... 176
2. In the absence of proof showing legal necessity, held, that a Hindoo Widow had no power to charge or mortgage the estate of her deceased Husband, so as to affect the inheritance. [*Rao Kurun Sing v. Nawab Mahomed Fyz Ali Khan*] ... 187
3. Where a member of a joint Hindoo family, of weak mind, went on a pilgrimage, and was not heard of for twelve years, and his death, therefore, presumed, his share of the family estate by the *Mithila* law falls into the general estate, and his

- Widow is entitled only to maintenance. [*Mussumat Anundee Koonwur v. Khedoo Lal*] ... 412
4. Decree against Widow in a suit by judgment-Creditor of her deceased Husband, effect of. Held, to be only in her representative capacity of her Husband's estate. [*The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Sing*] ... 605

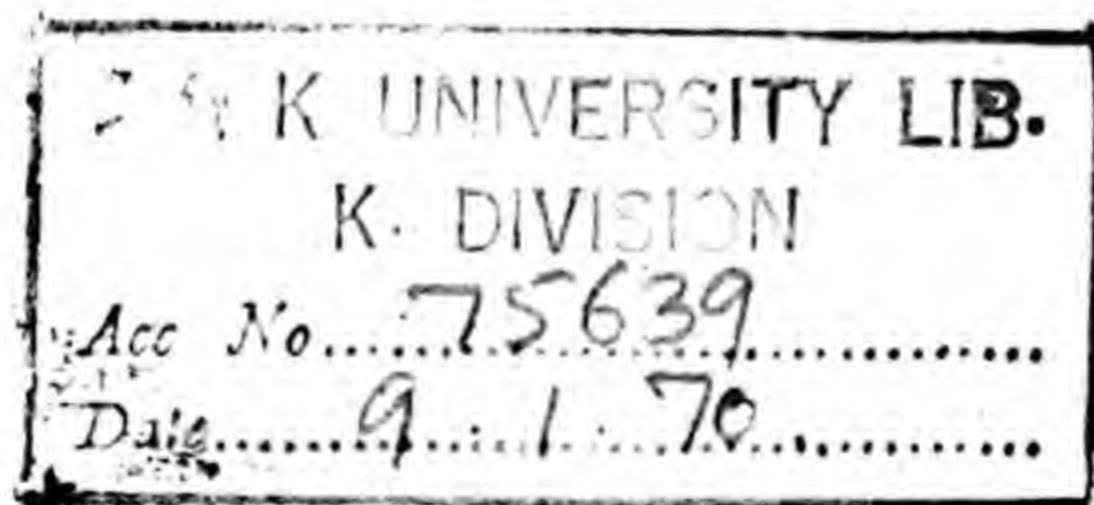
## WILL.

- Authority by, to Widow to adopt a Son. [*Rajendro Nath Holdar v. Jogendro Nath Banerjee*] ... 67

## ZUR-I-PESHGEE.

See "BENAMEE," 4.  
"MORTGAGE," 1.

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Jammu & Kashmir  
Srinagar.



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